TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 122.

HENRY W. SHACKER, PLAINTIFF IN ERROR,

vs.

THE HARTFORD FIRE-INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 12, 1874.

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1 Pleas in the circuit court of the United States in and for the northern district of Illinois, began and held in the city of Chicago, on Monday, the sixth day of July, in the year of our Lord one thousand eight hundred and seventy-four, before the Hon. Henry W. Blodgett, district judge, sitting pro tempore, in the absence of the Hon. Thomas Drummond, circuit judge, and on Thursday, the sixth day of August, one thousand eight hundred and seventy-four, and of the Independence of the United States the ninety-ninth year.

WM. H. BRADLEY,
Clerk.

HENRY W. SCHACKER
vs.
THE HARTFORD FIRE INSURANCE COMPANY. } Assumpsit.

Be it remembered that on the twenty-fourth day of February, A. D. one thousand eight hundred and seventy-four, the said defendants,
2 by Paddock & Ide, their attorneys, came and filed in said court a transcript of the proceedings of the superior court of Cook County, Illinois, had in said cause, together with a bond for costs, which said bond and transcript reads in the words and figures following, to wit:

Bond for costs.

United States of America, northern district of Illinois, ss. Circuit court, March term, A. D. 1874.

H. W. SCHACKER
vs.
HARTFORD FIRE INSURANCE COMPANY. } In assumpsit.

We enter ourselves security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of the court, and in default of payment by the defendant of any costs ordered or adjudged to be paid by it, we hereby agree and stipulate that execution may issue against our property for any costs taxed against said defendants. Dated this 24th day of February, A. D. 1874.

PADDOCK & IDE.

(Endorsed:) Filed Feby. 24, 1874. Wm. H. Bradley, cl'k.

3 *Transcript.*

UNITED STATES OF AMERICA,
State of Illinois, County of Cook, ss:

Pleas before the honorable the judges of the superior court of Cook County, in the State of Illinois, at a regular term of said superior court of Cook County, begun and holden at the court-house in the city of Chicago, in said county and State, on the first Monday, being the second day of February, in the year of our Lord one thousand eight hundred and seventy-four, and of the Independence of the United States of America the ninety-eighth.

Present: The honorable Joseph E. Gary, chief-justice of the superior court of Cook County; John A. Jameson and Samuel M. Moore, judges;

Charles H. Reed, prosecuting attorney; T. M. Bradley, sheriff of Cook County.

Attest:

ALEXANDER F. STEVENSON,
Clerk.

Be it remembered that heretofore, to wit, on the twenty-first day of January, in the year of our Lord one thousand eight hundred
4 and seventy-four, H. W. Schacker, by W. T. Burges, his attorney, filed in the office of the clerk of the superior court of Cook County his certain præcipe for summons, which is in words and figures as follows, to wit:

In the Cook superior court.

H. W. SCHACKER
vs.
THE HARTFORD FIRE INSURANCE COMPANY, OF Hartford, Connecticut. } Asst. Dr. $3,000.

The clerk will issue sum's in this cause to the next term of the court, Jan'y 21, '74.

W. T. BURGESS,
For Pltff.

And thereupon, to wit, on the day and year last aforesaid, there issued of it of said clerk's office the people's certain writ of summons, which said writ, with the return of the sheriff endorsed thereon, is in words and figures as follows, to wit:

STATE OF ILLINOIS,
Cook County, ss:

The people of the State of Illinois to the sheriff of said county, greeting:

We command you that you summon the Hartford Fire Insurance Company, of Hartford, Connecticut, if it shall be found in your
5 county, personally to be and appear before the superior court of Cook County, on the first day of the term thereof, to be holden at the court-house at Chicago, in said Cook County, on the first Monday of February next, to answer unto H. W. Schacker in the plea of trespass on the case, upon promise, to the damage of said plaintiff, as it is said, in the sum of three thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness Alexander F. Stevenson, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 21st day of January, A. D. 1874.

A. F. STEVENSON,
Clerk.

(Endorsed:) Served this writ on the within-named the Hartford Fire Insurance Company, of Hartford, Connecticut, by reading and delivering a copy thereof to G. F. Bissell, general agent of said company, this 22nd day of January, 1874. Fees, 70c.; paid. T. M. Bradley, sheriff: by Martin Best, deputy.

And afterwards, to wit, on the third day of February, A. D. one thousand eight hundred and seventy-four, the said defendant, by it

attorneys aforesaid, filed in said clerk's office its certain petition
6 and affidavit, which are in the words and figures as follows, to wit:

STATE OF ILLINOIS,
County of Cook:

In the superior court of Cook County.

H. W. SCHACKER, PLAINTIFF,
vs.
THE HARTFORD FIRE INSURANCE COMPANY, defendant. } Assumpsit.

And now comes the Hartford Fire Insurance Company, the defendant in the above-entitled suit, by its attorney, and enters its appearance in said suit.

And the said defendant shows to this honorable court that the plaintiff in said suit was, at the time of the commencement thereof, ever since has been, and still is, a citizen of the State Illinois, and that the defendant was, at the time of the commencement of said suit, ever since has been, and still is, a citizen of the State of Connecticut, incorporated, and created by the laws of said last State, and having its principal business office in Hartford, in said Connecticut.

And the defendant further shows that the matter in dispute in said suit exceeds the sum of value of five hundred dollars, exclusive
7 of costs, as will appear to the court by reference to the declaration of the plaintiff, filed in said suit, wherein he claims to recover of the defendant the sum of fourteen hundred dollars for an alleged loss under an alleged insurance policy of defts.

Wherefore the defendant prays that, in accordance with the laws of Congress in such case made and provided, an order may be made by this honorable court that said suit be removed for trial unto the next term of the circuit court of the United States for the northern district of Illinois, to be held at Chicago, in said district, on the first Monday of March, A. D. 1874.

And the defendant offers as surety that he will enter in said circuit court of the United States, on the first day of its session aforesaid, copies of the process issued against the defendant in said suit, the bond of this defendant and F. Bissell to the plaintiff in the penal sum of fifteen hundred dollars, conditioned that this defendant will enter said copies as aforesaid.

THE HARTFORD FIRE INSURANCE COMPANY,
Defendant.

By its attorneys:

PADDOCK & IDE.

STATE OF ILLINOIS,
Cook County, ss:

George F. Bissel, of said county, being duly sworn, deposes
8 and says that he is the general western agent of the Hartford Fire Insurance Company, defendant in the above-entitled cause; that he has read the foregoing statement of facts and petition of said defendant, and knows the contents thereof, and that the same are true, and that he has authority to make this affidavit from said defendant and on its behalf.

GEORGE F. BISSELL.

Subscribed and sworn to this third day of February, A. D. 1874, before me,

[NOTARIAL SEAL.] EDWARD BOUST,
Notary Public.

And afterwards, to wit, on the fourth day of February, in the year last aforesaid, the said defendant, by its attorneys aforesaid, filed in said clerk's office its certain bond, which is in words and figures as follows, to wit:

Know all men by these presents, that the Hartford Fire Insurance Company, of Hartford, in the State of Connecticut, as principal, and George K. Bissel, of the county of Cook, in the State of Illinois, as surety, are held and firmly bound unto H. W. Schacker, of Cook County, in the sum of fifteen hundred dollars, to be paid to the said H. W. Schacker, to the payment whereof, well and truly to be made, the
9 said The Hartford Fire Insurance Company and the said George F. Bissel, jointly and severally, bind themselves, and the heirs, executors, and administrators of the said George F. Bissel, firmly by these presents.

In witness whereof the Hartford Fire Insurance Campany has caused these presents to be subscribed by its corporate name by the general western agent, and its corporate seal to be hereunto affixed, and the said George F. Bissel, as security, has hereunto set his hand and seal, this third day of February, A. D. 1874.

The condition of this obligation is, that whereas the said H. W. Schacker has brought a suit in the superior court of Cook County, in the State of Illinois, at the February term, A. D. 1874, of said court, against the said The Hartford Fire Insurance Company, to recover the sum of three thousand dollars damages; and whereas the said the Hartford Fire Insurance Company has, on the day of the date hereof, filed its petition in said court, praying that said suit may be removed for trial unto the next term of the circuit court of the United States for the northern district of Illinois, to be held at Chicago, in said Cook County, in said district, on the first Monday of March, A. D. 1874:

Now, if the said The Hartford Fire Insurance Company, upon
10 the granting of the petition aforesaid, shall enter in the said circuit court of the United States, on the first day of its session aforesaid, copies of the process issued against it in said suit, then this obligation to be void; otherwise in full force and effect.

THE HARTFORD INSURANCE COMPANY,
{ CORPORATE SEAL. } By G. F. BISSELL, *General Western Agent.*
GEORGE F. BISSELL. [SEAL.]

And thereupon, to wit, on the day and year last aforesaid, the same being one of the days of the February term of the superior court of Cook County, the following among other proceedings were had in said court and entered of record, to wit:

H. W. SCHACKER.
vs.
THE HARTFORD FIRE INSURANCE COMPANY, of Hartford, Connecticut. } 7659, 117135. — Assumpsit.

This day comes the plaintiff to the suit, by W. T. Burgess, his attorney, and the defendant, by Paddock & Ide, its attorney, also comes and presents to the court its certain petition praying for the removal of said

cause into the United States circuit court in and for the northern district of the State of Illinois; and it appearing to the court, the honor-
11 able Joseph E. Gary presiding, that defendant has filed herein its bond, conditioned as required by the act of Congress in such case made and provided, it is ordered by the court that this cause be, and the same is hereby, transformed to said United States circuit court. And it is further ordered by the court that the clerk of this court do forthwith transmit to said United States circuit court a complete transcript of all papers and pleadings filed in said cause, together with all orders of court made and entered of record therein.

12 STATE OF ILLINOIS.
Cook County, ss:

I, Alexander F. Stevenson, clerk of the superior court of Cook County, in and for the State of Illinois, do hereby certify the above and foregoing to be a true, perfect, and complete cop' 'nscript of all papers and pleadings now on file in my office, and of all orders made and entered of record in said court in a certain cause lately pending in said court, on the common law side thereof, wherein H. W. Schacker was plaintiff and The Hartford Fire Insurance Company of Hartford, Conn., defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Chicago, this fourteenth day of February, A. D. 1874.

[SEAL.] A. F. STEVENSON,
Clerk.

(Endorsed:) Filed Feb'y 24, 1874. Wm. H. Bradley, cl'k.

13 And afterwards, to-wit, on the second day of March, A. D. one thousand eight hundred and seventy-four, the said plaintiff, by W. T. Burgess, esq., his attorney, filed in said court his declaration against said defendant, which reads in the words and figures following, to wit:

Declaration.

In the circuit court of the United States for the northern district of Illinois, of the March term thereof, A. D. 1874.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Henry W. Schacker, plaintiff in this suit, by his attorney, W. P. Burgess, comes and complains of the Hartford Fire Insurance Company, a corporation created and existing by and under the laws of the State of Connecticut, doing business in the State of Illinois, defendant, who was summoned, &c., of a plea of trespass on the case upon promises in the superior court of Cook County, in and for the State of Illinois, and changed upon the petition of said defendant to this court.

For that whereas heretofore, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and seventy-one, at Evanston, in said county of Cook, the defendant did make, issue,
14 and deliver to one O. P. Austin its certain policy of insurance, dated that day, and did thereby, then and there, in consideration of the receipt of twenty-three dollars ten cents, *did* insure to said Austin, for the amount of one thousand four hundred dollars, for the term of five years, as follows, viz: "On his one-and-one-half-story frame dwelling-house, situated detached on block two (2) Evanston, Cook County, Illi-

nois," against all such immediate loss or damage sustained by the assured and his legal representatives as might occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as thereinafter provided, from the first day of December, eighteen hundred and seventy-one, at 12 o'clock noon, to the first day of December, eighteen hundred and seventy-six, at 12 o'clock noon, to be paid sixty days after due notice and satisfactory proofs of the same, made by the assured, should be received at the office of the company in Hartford; it being covenanted as conditions of that contract, that the company might repair, restore, or replace the property lost or damaged, on giving notice of such intention within sixty days after the receipt of the proofs therein required, in which case the assured should furnish plans and specifications of property so lost or damaged; and in case of loss the assured should give immediate notice thereof and should
15 render to the company a particular account of said loss under oath, stating the time, origin, and circumstances of the fire, the occupancy of the building insured or containing the property insured; other insurance, if any, and copies of all policies, the whole value and ownership of the property, and the amount of loss or damage, and should produce the certificate under seal of a magistrate, notary public, or commissioner of deeds nearest the place of the fire and not concerned in the loss or related to the assured, stating that he had examined the circumstances of the assured, and verily believed that the assured had, without fraud, sustained loss on the property insured to the amount claimed by the assured, as by the said policy of insurance, now in the possession of the said plaintiff, on reference thereto, will among other things more fully and at large appear.

And it was and is also provided in and by said policy, among other things, that if any change took place in the title or possession of the property, whether by sale, transfer or conveyance, legal process or judicial decree; or the policy should be assigned without the consent of the company endorsed thereon; or if the assured was not the sole, absolute, and unconditional owner of the property insured; or (if said property be a building or buildings) of the land on which said building stand, by a title in fee-simple, and this fact is not expressed in the written portion of the policy, then and in every such case the said policy
16 should be void, and that no officer, agent, or representation of the said company should be held to have waived any of the terms and conditions of said policy, unless such waiver should be endorsed thereon in writing.

And the said plaintiff further avers that under and by virtue of a certain indenture of mortgage made by the said Austin to the said plaintiff conveying the said lands, whereon said house, insured as aforesaid, stood and formed part of the freehold to the said plaintiff, to secure to said plaintiff the payment of a certain sum of money at a certain time therein specified, with power of sale of said premises therein described by said plaintiff to satisfy the same if the same were not paid at maturity, as among other things will on reference to said mortgage more fully appear, he, the said plaintiff, did, the said money not being paid as in said mortgage provided, under and in pursuance of the powers in that behalf in said mortgage contained, and after the making of said insurance policy, sell to one John Frahen the said lands and premises for the amount due on said mortgage, and execute to him a conveyance whereby all the title, estate, and interest of said Austin in said land and premises became and were vested in him the said Frahen. That afterwards the said John Frahen, not having paid the said sum of money for which said

premises were struck off, sold, and conveyed to him as aforesaid
17 *to* said plaintiff, and said plaintiff holding a vendor's lien for the same, executed and delivered to said plaintiff a deed conveying the said lands and premises to him in payment and satisfaction of the sum so bid; and said Austin, for a valuable consideration to him paid, did, to wit, on the 28th day of September, A. D. 1872, assign and transfer said policy of insurance to said plaintiff by writing endorsed thereon; that afterwards, and on or about the 21st of February, one thousand eight hundred and seventy-three, at Evanston aforesaid, the said plaintiff stated and made known to the agent of the said insurance company at Evanston aforesaid, to wit, J. R. Fowler, he then and there being the agent of said company, and fully authorized by it to issue its policies of insurance and waive any of the conditions thereof, the said facts and circumstances touching the acquisition by said plaintiff of the title and estate of said Austin in and to the lands and premises whereon said house was standing and being, of his lien thereon and in and to said policy of insurance in manner aforesaid, and thereupon then and there the said Fowler, so being such agent as aforesaid, and being so informed, and having knowledge of the premises and of the interest of said plaintiff in the lands and premises whereon said house so insured, as aforesaid, was situated, and in said policy, and having full authority so to do, did endorse upon and write upon said policy the words following,
18 and sign the same as the agent of said company, to wit:

"Loss, if any, payable to H. W. Schacker, as his interest may appear.

"Evanston, Feby. 21, 1873.

"J. R. FOWLER, *Agt.*"

And said plaintiff avers that thereby then and there the said policy of insurance, and the right to recover for any loss that might happen by fire to said house thereby insured, within the terms of said policy, and subject to the conditions thereof not waived in and by said statement and endorsement so placed thereon by said agent, became and was vested in said plaintiff, and he entitled to recover such loss the same as though said policy had been assigned to him with the assent of said company, and in consideration thereof the said defendant then and there undertook and promised the said plaintiff to pay him, said plaintiff, such loss or damage as he might thereafter during the life of said policy sustain, within the terms and conditions and according to the true intent and meaning thereof.

And the said plaintiff further avers that afterwards, to wit, on the day of April, A. D. 1873, the said frame dwelling-house in said policy mentioned, was destroyed by fire, it then and there being of greater value than fourteen hundred dollars, and then and there being the sole property of him, the said plaintiff, of which loss due notice and
19 satisfactory proofs of the same were made by the said plaintiff and received by said company at it' office in Hartford more than sixty days before the commencement of this suit, to wit, on the 15th day of May, A. D. 1873.

And the said plaintiff further aver' that he did give immediate notice of said loss to said company, to wit, on the day of April, 1873, and did, to wit, on the 15th day of May, 1873, and more than sixty days before the commencement of this suit, render to the said defendant a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire, the occupancy of the building insured, and

what, if any, other insurance there was, and copies of all policies, the whole value and ownership of the property, and the amount of loss and damage, and produced the certificate, under seal of a notary public nearest the place of fire, not concerned in the loss or related to the assured, stating that he had examined the circumstances attending the loss, knew the character and circumstances of the said plaintiff, and verily believed that the said plaintiff had without fraud sustained loss on the property insured to the amount claimed by the said plaintiff, being the whole amount of fourteen hundred dollars. By means whereof the said defendant (not having given any notice of an intention to restore, replace, or rebuild the property lost & damaged as aforesaid) became and was liable to pay the said plaintiff the said sum of fourteen hundred
20 dollars, and being so liable, in consideration thereof, then and there promises the said plaintiff to pay him the said sum of money sixty days thereafter, which period hath now elapsed, yet the said defendant to pay said sum of money to said plaintiff hath hitherto wholly refused and still refuses.

And for that, whereas, also heretofore, to wit, on the 21st day or February, A. D. 1873, at Evanston, in said district, the said defendant made and delivered to the said plaintiff its certain policy of insurance, in the words and figures substantially as follows:

"No. 898. "$1,400.

"The Hartford Fire Insurance Company, of Hartford, Conn., by this policy of insurance, in consideration of the receipt of twenty-three and $\frac{10}{100}$ dollars, do insure O. P. Austin, of Evanston, Illinois, for the amount of one thousand four hundred dollars, for the term of five years, as follows, viz: $1,400 on his one and one-half story frame dwelling-house, situated, detached, on block two (2) Evanston, Cook County, Illinois.

Loss, if any, payable to H. W. Schacker, as his interest may appear.
Evanston, Feby. 21, 1873.

J. R. FOWLER, *Agt.*

$1,200 insured in the Merchants' of Chicago.
$1,400.00—5 years—@ 1.65%—is $28.10.

21 Against all such immediate loss or damage sustained by the assured and his legal representatives as may occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as hereinafter provided, from the first day of December, eighteen hundred and seventy-one, at 12 o'clock noon, to the first day of December, eighteen hundred and seventy-six, at 12 o'clock noon, to be paid sixty days after due notice and satisfactory proofs of the same, made by the assured, are received at the office of this company in Chicago; it being covenanted as conditions of this contract, and this company may repair, restore, or replace the property lost or damaged, on giving notice of such intention within sixty days after receipts of proofs herein required, in which case the assured shall furnish plans and specifications of property so lost or damaged; and that this company shall not be liable until the actual payment of the premium, nor for loss by theft at or after the fire, nor for loss caused by invasion, insurrection, riot, civil commotion, military or usurped power; nor for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only; nor for loss or damage caused by removal of property from a building where there is no loss by fire, unless such removal was necessary to preserve the property, in

which case the damage shall be borne by both parties, in proportion as the whole sum insured bear' to the whole value of the property insured; nor for loss or damage caused by neglect to use all practicable means to save and preserve the property from damage at and after the fire, and there can be no abandonment to the company of the property insured.

If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this policy, and a warranty by the assured, and if the assured in a written or verbal application makes any erroneous representation or omits to make known any fact material to the risk; or if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, without the consent of the company written hereon; or if the risk be increased by any means within the control of the assured; or immediately upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust; or if the assured shall be adjudged a bankrupt, or if the property insured be assigned under any bankrupt or insolvent laws; or if any change take place in the title or possession of the property, whether by sale, transfer, or conveyance, legal process, or judicial decree; or the policy is assigned without consent of the company endorsed hereon; or if the assured is not the sole, absolute, and unconditional owner of the property insured, or (if said property be a building or buildings) of the land on which such building or buildings stand, by a title in fee-simple, and this fact is not expressed in the written portion of the policy; or if gunpowder, phosphorus, naphthe, benzine, gasoline, or petroleum fluid, crude earth or coal oils, are kept or used on the premises; or if camphene, burning-fluid, or refined coal or earth oils are kept for sale, stored or used on the premises in quantities exceeding one barrel at any one time, without written consent; or if the premises hereby insured shall become vacated by the removal of the owner or occupant, and so remain for a period of more than fifteen days without notice to the company, and consent endorsed hereon, or for neglect or deviation from the laws or police regulations made to prevent accidents from fires, then, and in every such case, this policy shall be void. This policy may be cancelled at any time at the request of assured, the company retaining customary monthly short rates for time policy has been in force; it may also be cancelled at any time by the company, on giving written or verbal notice to that effect, and refunding or tendering a ratable proportion of the premium for the unexpired term of the policy.

In case of loss the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire; the occupancy of the building insured or containing the property insured, other insurance if any, and copies of all policies, the whole value and ownership of the property, and the amount of loss or damage, and shall produce the certificate, under seal of a magistrate, notary public, or commissioner of deeds, nearest the place of the fire, and not concerned in the loss or related to the insured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount claimed by the said assured. In no case shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire, nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby

insured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies, and without reference to the solvency or the liability of other insurers. Assignors, unless the assignee owns the property, must make the proofs hereby required. If required, the assured shall produce books of account and other proper vouchers, original or duplicate invoices, and all property hereby insured, whether damaged or not damaged; and be examined under oath by any person appointed by the company touching all questions by him deemed pertinent to the loss, and subscribe
25 such examination when reduced to writing; and a refusal to answer such questions and subscribe such examination, when reduced to writing, shall cause a forfeiture of all claims under this policy. Damage to property not wholly destroyed, unless the amount of said damage is agreed upon between the assured and the company, shall be appraised by disinterested and competent persons mutually agreed upon by the parties when personal property is damaged; the assured shall put it in best order possible, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised; and the detailed report of the appraisers in writing, under oath, shall form a part of the proofs hereby required, each party paying one-half the expense of the appraisal, and until such proofs and certificates are produced and examination and appraisal permitted, the loss shall not be payable. And the company reserves the right to take any part or all of the property appraised, paying market-value therefor, in case the damage as appraised is deemed excessive. Any fraud or attempt at fraud, or any false swearing, on the part of the assured shall cause a forfeiture of all claim under this policy.

The insurance to be on the basis that in no event will this company be liable for a sum greater than such portion hereby re-insured bears to the whole sum insured by the company re-insured; and in case of
26 loss this company to pay pro rata at and in the same time and manner as the company re-insured.

It expressly covenanted by the parties hereto that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery unless commenced within twelve months next after the loss shall have occur'ed; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding. And it is further expressly covenanted by the parties hereto that no officer, agent, or representative of this company shall be held to have waived any of the terms and conditions of this policy, unless such waiver shall be endorsed hereon in writing.

N. B.—Books of accounts, securities for money, evidences of debt, deeds, money, bullion, plate, jewels, medals, engravings, painting', sculptures, ornaments, musical and scientific instruments, models and curiosities, frescoes or wall-decorations, exceeding in value five dollars per square yard, are not insured, unless particularly mentioned in the policy. Plate-glass doors and windows, when the plates are of the dimension of nine square feet or more, are not insured under the within policy, unless separately and specifically mentioned.

This policy is made and accepted upon the above express con-
27 ditions, but shall not be valid unless countersigned by the duly authorized agent of the Hartford Fire-Insurance Company at Evanston, Ill.

In witness whereof the said Hartford Fire-Insurance Company have caused these presents to be signed by their president and attested by their secretary, in the city of Hartford, and State of Connecticut.

GEO. L. CHASE, *President.*
J. R. FOWLER, *Agent.*

J. D. BROWNE, *Secretary.*
Countersigned at Evanston this 1st day of December, 1871.

And upon which policy the indorsements had theretofore been made, and were then thereon duly signed by said Austin in said policy named, to wit:

☞ This policy is not assignable for purposes of collateral security, but in all such cases it is to be made "payable in case of loss," etc., by endorsement on its face. In case of actual sale or transfer of title, leave being previously obtained, the form subjoined may be used, which must be executed at the time of said transfer.

The property hereby insured having been purchased by H. W. Shacker, the Hartford Fire-Insurance Company consent that the interest of $1,400 O. P. Austin in the within policy may be assigned to said purchaser, subject, nevertheless, to all the terms and conditions therein mentioned and referred to.

28 Dated at Evanston this twenty-eighth day of September, 1872.
Agent.

For value received, I transfer *transfer*, assign, and set over unto H. W. Schacker and his assigns all my right, title, and interest in this policy of insurance, and all benefit and advantage to be derived therefrom.

Witness my hand and seal this 28th day of Sept., 1872.
O. P. AUSTIN.

Sealed and delivered in the presence of—
GEO. E. SAWYER.

And said plaintiff further avers that O. P. Austin in the said policy mentioned made to said plaintiff, on or about the 18th day of September, A. D. 1871, a certain indenture of mortgage of that date, he, said Austin, at the making of said mortgage, and on the first day of December, 1871, a date mentioned in said policy of insurance, holding the land on which said building stood under a contract from the Northwestern University to him, said Austin, which said contract was and is in writing, and for a warranty deed, when he, said Austin, should have paid for the same as in and by said contract provided, and then and since and now in full force, and by said indenture did mortgage the said land to him, the said plaintiff, to secure to him, said plaintiff, the payment of a certain sums of money at the times and with the interest therein
29 specified, with power of sale of the mortgaged premises by said plaintiff, should such sums of money or any of them not be paid when due, and which said mortgage contained a recital after the description of the land-mortgage substantially as follows: "The aforesaid promissory notes being given for labor performed and material furnished to build the house situated upon the premises hereinbefore described, (the mortgaged premises meaning.) The above specified lot is now lot number twenty-two, (22,) in the subdivision of block two, (2,) is held by said Austin on a contract by the Northwestern University to him, which said contract is for a warranty deed when he, said Austin, shall have paid for the same, and he intends herein to mortgage the build-

ings and his interest in the lot only." And the said plaintiff, the said moneys due under said mortgage not being paid when due, after the said first day of December, A. D. 1871, and before said 21st day of February, 1873, under and in pursuance of the powers in that behalf in said mortgage contained, did advertise and sell the said land and premises to John Frahan for a certain sum of money, to wit, the amount due on said mortgage, and thereupon did execute to him a conveyance in pursuance of such sale, whereby all the estate, title, and interest of said Austin in and to said land, house, and premises, vested in him, the said Frahan.

That afterwards, and before said 21st day of February, A. D.
30 1873, the said John Frahen not having at the time of said sale or afterwards paid the said sum of money for which said premises were at said sale under said mortgage struck off and sold to him, and said plaintiff having from the time of such sale held a vendor's lien on said lands and premises for the payment thereof, being a greater sum than fourteen hundred dollars. and said Frahen holding the same in trust for said plaintiff, executed and delivered to said plaintiff, in satisfaction and payment of that amount and of said trust, a deed dated the 24th day of March, 1873, releasing to him, the said plaintiff, said lands and premises, whereby the said plaintiff became the assignee of all the interest of said Austin in the said lands and premises, the house thereon, and in said policy mentioned.

That on or about the 21st day of February, A. D. 1873, at Evanston aforesaid, said plaintiff did make known to said defendant and to its agent, the said Fowler, the nature and extent of the interest and title of the said plaintiff in the land on which said house was situated, and did produce to them then and there the said mortgage and said deed to said Frahen, and said policy of insurance with the endorsement thereon as herein above set out, and said defendant and its said agent was then and therewell advised of the contents of each and all of them, as well by
31 inspection thereof as also by the statements of the contents thereof of his lien upon and of his title to said land then and there made by said plaintiff to said agent, and as hereinabove set out. And said defendant being so then and there advised of and well knowing the contents of said mortgage and deed to Frahen, and that the said plaintiff was not the sole, absolute, and unconditional owner of the said land in fee-simple, and that he was such assignee as aforesaid, and held such interest and such lien thereon as aforesaid, did thereupon, afterwards, to wit, on the day and year and at the place last aforesaid, make, execute, deliver, and re-issue to the said plaintiff the said policy with the said writing signed by said Fowler as agent, written upon the face thereof, and did thereby then and there, in consideration of the premises, undertake and promise the said plaintiff to pay him, the said plaintiff, all such loss or damage as he might thereafter during the residue of the time for which the same was issued sustain within the terms and conditions, and according to the true intent and meaning thereof, said endorsement signed by said Fowler, being taken as part thereof.

And said plaintiff further avers that afterwards, to wit, on the first day of April, A. D. 1873, he then and there the interest in the
32 land on which said house was situated, and of the said house as aforesaid, the said house was destroyed by fire, it then and there being of greater value than fourteen hundred dollars, and said plaintiff thereby sustained loss and damage to a large sum of money, to wit, the *the* sum of two thousand dollars and upwards, of which loss due notice and satisfactory proofs were made by the said plaintiff and received by

said defendant at its office in Hartford more than sixty days before the commencement of this suit, to wit, on the 15th day of May, 1873.

And said plaintiff further avers that he did give immediate notice of said loss to said defendant, to wit, on the day of April, 1873, and did, to wit, on the 15th day of May, A. D. 1873, and more than sixty days before the commencement of this suit, render to the said defendant a particular account of said loss under oath, stating the time, origin, and circumstances of the fire, the occupancy of the building insured, what, if any, other insurances there was, and copies of all policies, the whole value and ownership of the property and the amount of loss and damage, and produced the certificate under seal of a notary public nearest the place of fire and not concerned in the loss or related to the assured,
stating that he had examined the circumstances attending the
33 loss, knew the character and circumstances of the said plaintiff,
and verily believed that the said plaintiff had without fraud sustained loss on the property insured to the amount claimed by the said plaintiff, being the whole amount of fourteen hundred dollars.

By means of which said several premises the said defendant then and there, to wit, on the 15th day of May, A. D. 1873, at Evanston aforesaid, became and was liable to pay said plaintiff the said sum of fourteen hundred dollars in said policy mentioned, and being so liable, in consideration thereof, afterwards, to wit, on the day and year, and at the place last aforesaid, undertook and promised the said plaintiff to pay him the said sum of money in sixty days thereafter, which period hath now elapsed, yet the said defendant, although often requested so to do, hath hitherto wholly neglected and refused to pay the same to the said plaintiff, and still doth neglect and refuse, to wit, at Evanston aforesaid.

To the damage of the said plaintiff three thousand dollars, therefore this suit, &c.

W. S. BURGESS,
For Plff.

(Endorsed:) Filed March 2d, 1874. Wm. H. Bradley, clk.

34 And afterwards, to wit, on the eighth day of May, A. D. one thousand eight hundred and seventy-four, the said defendant, by its attorneys, file' the following pleas to said declaration; which read in the words and figures following, to wit:

Pleas.

United States circuit court, northern district of Illinois, May term, 1874.

HENRY W. SCHACKER
vs.
THE HARTFORD FIRE-INSURANCE COMPANY. } Assumpsit.

1. And said defendant, by Paddock & Ide, its attorneys, comes and defends the wrong and injury when, &c., and says that it did not undertake or promise in manner and form as said plaintiff has above thereof in his declaration complained of it; and of this said defendant puts itself upon the country.

2. And for a further plea defendant says actio non, because it says that the policies of insurance relied upon in said declaration are one and the same; that in and by one of the conditions of insurance referred to in said policy of insurance, and which conditions at the time of making

said policy were annexed to and form a part of said policy, it is
35 provided that if the assured is not the sole, absolute, and unconditional owner of the property insured, or (if said property be a building or buildings, of the land on which such building or buildings stand, by title in fee-simple,) and this fact is not expressed in the written portion of the policy, then and in such case the said policy should be void. And said defendant avers that at the time of making said policy and the promises alleged in said declaration, to wit, at the time when, &c., in manner and form as alleged in said declaration, the said assured was not the sole, absolute, and unconditional owner of the land on which the building alleged to have been insured stood, by title in fee-simple, but then and there owned only an equitable interest in said land, nor was the fact of the real interest of said assured expressed in the written portion of said policy.

And this said defendant is ready to verify, wherefore it prays judgment, &c.

3. And for a further plea, defendant says actio non, because it says that in and by a certain other one of the conditions of insurance referred to in the policies of insurance mentioned and set forth in the plaintiff's declaration, and which conditions at the time of making said policy were annexed to and form a part of said policies, it is provided that if said policies are assigned without consent of the said defendant en-
36 dorsed thereon, the said policies should be void; and the defendant avers that after the making of said policy on, to wit, the 28th day of September, 1872, and prior to said alleged loss, the said assured assigned the said policies of insurance without the consent of said defendant being endorsed thereon. And this the defendant is ready to verify. Wherefore it prays judgment, &c.

4. And for a further plea, defendant says actio non, because it says that the policies of insurance declared upon are one and the same and not different; that in and by a certain other one of the conditions of insurance referred to in said policy of insurance, and which conditions at the time of making said policy were annexed to and form a part of said policy, it is provided that if any change takes place in the title or possession of the property insured, whether by sale, transfer, or conveyance, legal process, or judicial decree, the said policy should be void; and the defendant avers that the title of said assured in and to said insured property was on, to wit, the 21st day of February, 1873, sold, transferred, and conveyed from said assured by his authority, and by virtue of a certain mortgage with a power of sale therein written, made and delivered by the said assured to said plaintiff on, to wit, September 28, 1871, and which said mortgage was at the time of said sale in full force,
37 whereby a change took place in the title of said assured in and to said insured property on, to wit, the 21st day of February, 1873, prior to said alleged loss, and the said assured then and there became divested of the same. And this the defendant is ready to verify. Wherefore it prays judgment, &c.

By PADDOCK & IDE,
Its Attorneys.

(Endorsed:) Filed May 8, 1874. Wm. H. Bradley, clerk.

38 And afterwards, to wit, on the twenty-first day of May, A. D. one thousand eight hundred and seventy-four, the plaintiff, by his attorneys, comes and files the following replication:

U. S. cir. court, N. D. of Ills.

SCHACKER
vs.
HARTFORD FIRE-INS. CO.

As to the first plea whereof the said defendant hath put himself upon the country, the plaintiff doth the like, &c.

W. S. BURGESS,
For Plff.

(Endorsed:) Filed May 21, 1874. Wm. H. Bradley, clk.

39 And afterwards, to wit, on the twentieth day of July, one thousand eight hundred and seventy-four, in the record of the proceedings of said court in said cause, is the follo'ing entry, to wit:

H. M. SHACKER
vs.
THE HARTFORD FIRE-INSURANCE COMPANY. } Assumpsit.

Now come the parties, by their attorneys, and upon issue joined by agreement of the parties as per stipulation filed, they waive the intervention of a jury, and for trial put themselves upon the court, and after hearing the evidence and arguments for counsel, the court takes the same under advisement.

And afterwards, to wit, on the 6th day of August, A. D. one thousand eight hundred and seventy-four, in the record of proceedings of said court in said cause, is the following entry, to wit:

H. M. SHACKER
v.
THE HARTFORD FIRE-INSURANCE COMPANY. } Assumpsit.

40 This cause having been submitted to the court for trial without the intervention of a jury by the written stipulation of the parties, the court, from the evidence in said cause, finds the following facts:

1st. That on the 1st day of December, 1871, said defendant issued to O. P. Austin the policy of insurance, whereby, for a certain premium therein mentioned, defendant insured said Austin for the term of five years in the sum of fourteen hundred dollars on his dwelling-house, situate in block two, in the town of Evanston.

2d. That said policy of insurance contained the following condition, "or if the insured is not the sole, absolute, and unconditional owner of the property, or (if said property be a building or buildings) of the land on which said building or buildings stand, by a title in fee-simple, and this fact is not expressed in the written portion of the policy * * * * then, and in every such case, said policy shall be void." Said policy also contained a clause declaring that it should not be assignable without the assent of the defendant duly endorsed thereon in writing.

3rd. That, at the time of the issue of said policy, said Austin
41 was not seized of a fee-simple title in the lot on which said building was situated; but, on the contrary, the fee of said lot was in the Northwestern University, and said Austin held a contract from said Northwestern University, whereby he was to receive a conveyance of

said lot in fee when he should make certain payments and perform covenants in said contract set forth; and the special character of said Austin's interest in said lot was not set forth in the written part of said policy, nor noted upon said policy, and, in fact, neither said defendant, nor its agent issuing said policy, were aware of the special nature of Austin's title at the time said policy was issued.

4th. That on the day of September, 1871, said Austin being indebted to plaintiff, mortgaged his interest in said lot and building to plaintiff in due form, and default having been made in the payment of the indebtedness secured by said mortgage, said plaintiff advertised and sold said mortgaged premises at public auction under the power of sale contained in said mortgage, and one John Phram bid off said premises at said sale at the request of and for the use of said plaintiff; that
42 after said sale plaintiff requested one Fowler, who was the local agent of defendant at Evanston, to consent in writing on behalf of said defendant to the assignment of said policy to plaintiff by said Austin; that said agent refused to endorse such assent upon said policy, but stated to plaintiff that all he could do was to write into the body of the policy these words: "Loss, if any, payable to W. H. Shacker, as his interest may appear," which words were accordingly written into said policy and said policy returned to the plaintiff by said agent; that said agent at the time he wrote said clause in said policy did not know that said Austin's or plaintiff's title was less than a fee-simple; that after said mortgage-sale and the insertion of the words in said policy by said agent said premises were destroyed by fire, and said Shacker caused notice and proofs of loss to be furnished in due form and in apt time to said defendant; and that defendant refused payment for the reason of the failure to properly set out the title of the assured to the property.

5th. The court finds the issue for the defendant. It is ther'upon
43 considered and adjudged by the court that the defendant do have and recover of and from the said plaintiff the costs and charges herein taxed at twenty-one dollars and forty-five cents, and that execution issue therefor.

Bond in error.

And afterwards, to wit, on the 1st day of September, A. D. 1874, the following bond was filed in the office of the clerk of said court, to wit:

In the Supreme Court of the United States.

HENRY W. SCHACKER
v.
THE HARTFORD FIRE-INSURANCE COMPANY. } In error.

Know all men by these presents that we, Henry W. Shacker, as principal, and John Frahm, as his surety, are held and firmly bound unto the said above-named defendant in the sum of five hundred dollars, to be paid to the said defendant, its successors and assigns, to which payment, well and truly to be made, we bind ourselves and each of us,
44 jointly and severally, and our and each of our heirs, executors, & administrators jointly, firmly by these presents, sealed with our seals and dated this 28th day of August, A. D. 1874.

Whereas the above-named Henry W. Shacker hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judg-

ment rendered by the circuit court of the United States for the northern district of Illinois in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named Shacker shall prosecute his said writ of error to effect and answer all costs if he fail to make good his plea, then this obligation to be void; otherwise the same shall be and remain in full force and virtue.

H. W. SHACKER. [SEAL.]
JOHN FRAHM. [SEAL.]

Attest:
S. M. HUNTOON.

(Endorsed:) Approved. Thomas Drummond. Filed Sept. 1st, 1874. W. H. Bradley, clerk.

45 And afterwards, to wit, on the first day of Sept., A. D. one thousand eight hundred and seventy-four, the said plaintiff, by his attorneys, comes and files the following bill of exceptions, to wit:

Bill of exceptions.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States for the northern district of Illinois, of the July term thereof, A. D. 1874. Before the Hon. Henry W. Blodgett, judge, &c.

HENRY W. SCHACKER
vs.
THE HARTFORD FIRE-INSURANCE COMPANY. } Ass't.

Be it remembered that on the 20th day of July, A. D. 1874, on' of the days of said July term, came the plaintiff, by his attorney, W. S. Burgess, and the defendant, by its attorneys, Messrs. Paddock & Ides, and a jury to try the issues in fact in this cause having been waived, and *and* the cause submitted to the Hon. H. W. Blodgett, judge, &c.,
46 for trial by the stipulation of the parties, in writing, as follows: (Here insert.)

In the U. S. cir. court.

HENRY W. SCHACKER
vs.
HARTFORD FIRE-INSURANCE CO. }

It is hereby stipulated that this case shall be submitted to & tried by the judge of said court, and a jury waived therein.

And passed on first call before jury is discharged.

W. S. BURGESS,
For Plffs.
PADDOCK & IDE.
For Defts.

(Endorsed:) Filed May 28, 1874. Wm. H. Bradley, clk.

This cause now came on for hearing and trial before him, and the

parties having also agreed in open court that the issues of fact in the case should be submitted to the court, with the privilege to each party to amend, if necessary, upon the facts proven, either as to parties or statement of cause of action or defense; and that the special pleas be and were withdrawn, with leave to the defendant to show under
47 the general issue any matter of defence.

The plaintiff thereupon, to maintain the issue on his part, introduced the following proofs, to wit:

HENRY W. SCHACKER, being first duly sworn, testified as follows: I am the plaintiff in this suit. I know O. P. Austin. On or about the 18th day of August, 1871, he made this mortgage to me.

Witness produces mortgage, and it is read in evidence, as follows, to wit: (Here insert.)

Mortgage.

[Revenue-stamp duties for every $500, or fractional part thereof, 50 cents.]

This indenture, made this eighteenth day of September, in the year of our Lord one thousand eight hundred and seventy-one, between O. P. Austin, a batchelor of the town of Evanston, county of Cook, and State of Illinois, of the first part, and Henry W. Shacker, of the same place, of the second part:

Whereas the said party of the first part is justly indebted to the said party of the second part in the sum of one thousand and two hundred ($1,200) dollars, secured to be paid by a certain two promissory notes, bearing even date herewith, payable to the order of said Schacker, as follows, to wit, November 12th, after date, eight hundred dollars; and four hundred dollars on the first of April after date, the last with use at ten per cent. per annum:

48 Now, therefore, this indenture witnesseth that the said party of the first part, for the better securing the payment of the money aforesaid, with interest thereon, according to the tenor and effect of the said two promissory notes above mentioned; and, also, in consideration of the further sum of one dollar to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, remised, aliened, and conveyed, and by these presents do grant, bargain, sell, remise, alien, and convey unto the said party of the second part, his heirs and assigns, forever, all the following-described lots, pieces, or parcel' of land, situate in the county of Cook, State of Illinois. to wit: The north half of lot nine (9) in block two, (2,) being the north fifty feet of lot nine (9) in said block two, (2,) in the village of Evanston; the aforesaid promissory notes being given for labor performed and material furnished to build the house situate upon the premises hereinbefore described.

The above specified lot is now lot number twenty-two (22) in the subdivision of block two, (2,) and is held by said Austin on a contract of the Northwestern University to him, which said contract is for a warrantee deed when the said Austin shall have paid for the same, and he intends herein to mortgage the buildings and his interest in the lot only; together with all and singular the tenements, hereditaments, privileges, and appurtenances thereunto belonging or in any wise ap-
49 pertaining, with the rents, issues, and profits thereof, and all the estate, interest, and claim whatsoever of the said party of the first part, in law as well as in equity, in and to the premises hereby conveyed; to have and to hold the same, with the appurtenances, unto

the said party of the second part, his heirs, executors, administrators, and assigns, and to their only proper use, benefit, and behoof: Provided always, and these presents are upon this express condition that if the said party of the first part, his heirs, executors, administrators, or assigns, shall well and truly pay or cause to be paid to the said party of the second part, his heirs, executors, administrators, or assigns, the aforesaid sum of money, with such interest thereon, at the time and in the manner specified in the above-mentioned two promissory notes, according to the true intent and meaning thereof, then these presents and everything herein expressed shall be absolutely null and void. But in case of default in the payment of said notes above-mentioned, or any part thereof, according to the tenor and effect thereof, the said party of the second part, his legal representatives or attorney, after having advertised such sale ten days in a newspaper published in Chicago, or by posting up written or printed notices in four places in the county where said premises are situate, may sell the said premises, or any part thereof,
and all right and equity of redemption of the said party of the
50 first part, his heirs, executors, administrators, or assigns therein,
at public vendue, to the highest bidder for cash, at the court-house at the time appointed in such advertisement, or may adjourn the sale from time to time, at discretion; and, upon the making of such sale or sales, as the attorney of the said party of the first part for such purposes hereby constituted, irrevocable or in the name of the said party of the second part, or his legal representatives, shall execute and deliver to the purchaser deeds for the conveyance in fee of the premises sold, and shall apply the proceeds of sale to the payment of (1) expenses of advertising, selling, and conveying as aforesaid, including attorneys' fees, and (2) the amount due on said notes, (3) rendering the overplus, if any, to the said party of the first part, or his assigns.

And the said O. P. Austin, party of the first part, expressly waives, releases, and relinquishes unto the said party of the second part, his heirs, executors, administrators, and assigns, all rights, titles, claims, interest, and benefit whatever, in and to the above-described premises, and each and every part thereof, which is given by or results from all laws of this State pertaining to the exemption of homesteads.

And the said O. P. Austin, party of the first part, covenants with the said party of the second part, and his heirs, executors, administrators, or
assigns, that he is well seized in fee, except as hereinbefore speci-
51 fied as to contract for deed of the said premises, and hath good
right to convey the same as aforesaid; that they are free from all incumbrance; and that he will forever warrant and defend the same against all lawful claims.

In witness whereof the said party of the first part hereunto set his hand and seal the day and year above written.

O. P. AUSTIN. [SEAL.]

Signed, sealed, and delivered in presence of—

E. M. HAMILTON.

[50 cents internal revenue. Entry of goods.]
[1 dollar internal revenue. Entry of goods.]

STATE OF ILLINOIS,
Cook County, ss:

I, G. M. Huntoon, a notary public in and for said county, in the State aforesaid, do hereby certify that O. P. Austin, a batchelor, who is personally known to me as the real person whose name is subscribed to the

above mortgage, appeared before me this day in person and acknowledged that he executed and delivered the said mortgage as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this twentieth day of September, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] G. M. HUNTOON,
Notary Public.

52 I built a house for him on the premises described in it, and that mortgage was given to me to secure me for what was left unpaid for building it. Austin did not pay the mortgage, and about the 28th September, 1872, he assigned to me this policy of insurance in writing upon it. (Witness here produces a policy of insurance issued by the defendant.) This assignment was signed by said Austin to further secure what he owed me. It is a printed blank endorsed on the policy, and was filled by Austin in his own handwriting. Austin also filled up the printed blank on it for the agent to sign, as the consent of the company, except the words "O. P. Austin." I know J. R. Fowler, the agent of the defendant at Evanston. On the 21st February, 1873, I took this policy with this assignment made by Austin, and the other blank, as filled up by him, Austin, to said Fowler to get his consent as agent to the assignment. I told him I had a mortgage from Austin; had had it foreclosed by sale under the power to John Fraben, for me, and that he was to convey it to me by quit-claim deed, and whenever I asked him. I did not have the mortgage or papers with me—only the policy.

There was nothing said about Austin's title. Fowler said he knew what Austin's title was, and we began to talk about his (Fowler) buying the property for me. He said he could not attend to fixing
53 up the policy then, and to call again that evening about it. I saw him again that day. He had written the words "O. P. Austin" in the consent blank which I have alluded to above. He said at this second interview that he could not sign the consent endorsed upon the policy, because the assignment had been made such a length of time, being dated in September, 1872, but that he would fix it up so as to protect my interests, or make it all right for me to make the loss, if any should happen, payable to me, so that I should not lose anything; that he could put it on the face of it, which was the best he could do for me.

He then produced the policy to me and wrote these words on the face of it: "Loss, if any, payable to H. W. Schacker, as his interest may appear.

"Evanston, Feb'y 21, 1873.

"J. R. FOWLER, *Agt.*"

We had some further talk a few days afterwards about his buying the property, but we concluded no bargain. John Frahen was present at the last of these conversations. No one but myself and Fowler were present on the 21st February, 1873. Fowler knew then what my title from Austin was under the mortgage I held, and he said he knew
54 what Austin's title was. The insurance policy and the writings upon the face and back of it, alluded to by the witness, are as follows, to wit: (Here insert.)

55 The Hartford Fire Insurance Company.—Incorporated 1810.—Charter Perpetual.

[Flammis quæ correpta ruunt renevare conamur.]

HARTFORD, CONN.

No. 898. $1,400.00.

By this policy of insurance, in consideration of the receipt of twenty-three and $\frac{10}{100}$ dollars, do insure O. P. Austin, of Evanston, Illinois, for the amount of one thousand four hundred dollars, for the term of five years, as follows, viz: $1,400.00, on his one and one-half story frame dwelling-house, situated, detached, on block two, (2,) Evanston, Cook County, Illinois.

[U. S. inter. revenue, 25 cts.]

Loss, if any, payable to H. W. Schacker, as his interest may appear.
Evanston, Feb. 21, 1873.

J. R. FOWLER, *Agt.*

56 $1,200 insured in the Merchant's of Chicago. $1,400.00, 5 years, @ 1.65% is $23.10.

Against all such immediate loss or damage sustained by the assured and his legal representatives, as may occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as hereinafter provided, from the first day of December, eighteen hundred and seventy-one, at 12 o'clock, noon, to the first day of December, eighteen hundred and seventy-six, at 12 o'clock, noon; to be paid sixty days after due notice and satisfactory proofs of the same, made by the assured, are received at the office of this company in Hartford; it being covenanted as conditions of this contract, that this company may repair, restore, or replace the property lost or damaged, on giving notice of such intention within sixty days after receipt of proofs herein required, in which case the assured shall furnish plans and specifications of property so lost or damaged; and that this company shall not be liable until the actual payment of the premium, nor for loss by theft at or after a fire, nor for loss caused by invasion, insur-
57 rection, riot, civil commotion, military or usurped power; nor for loss caused by lightning, or explosions of any kind, unless fire ensues, and then for the loss or damage by fire only; nor for loss or damage caused by removal of property from a building where there is no loss by fire, unless such removal was necessary to preserve the property; in which case the damage shall be borne by both parties in proportion as the whole sum insured bears to the whole value of the property insured; nor for loss or damage caused by neglect to use all practicable means to save and preserve the property from damage at or after the fire; and there can be no abandonment to the company of the property insured. If an application, survey, plan, or description of the property herein insured, is referred to in this policy, such application, survey, plan, or description shall be considered a part of this policy, and a warranty by the assured; and if the assured, in a written or verbal application, makes any erroneous representation, or omits to make known any fact material to the risk, or if the assured shall have or shall hereafter make any other insurance on the property hereby
58 insured, without the consent of the company written hereon; or if the risk be increased by any means within the control of the

assured; or immediately upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust, or if the assured shall be adjudged a bankrupt, or if the property insured be assigned under any bankrupt or insolvent laws, or if any change takes place in the title or possession of the property, whether by sale, transfer, or conveyance, legal process or judicial decree, or the policy is assigned without consent of the company endorsed hereon; or if the assured is not the sole, absolute, and unconditional owner of the property insured, or (if said property be a building or buildings, of the land on which such building or buildings stand by a title in fee-simple,) and this fact is not expressed in the written portion of the policy, or if gunpowder, phosphorus, naphtha, benzine, gasoline, or petroleum fluid, crude earth or coal oils are kept or used on the premises; or if camphene, burning-fluid, or refined coal or earth oils are kept for sale, stored, or used on the premises in quantities exceeding one barrel at any one time without written consent, or if the premises hereby insured
59 shall become vacated by the removal of the owner or occupant, and so remain for a period of more than fifteen days, without notice to the company, and consent endorsed hereon; or for neglect or deviation from the laws or police regulations made to prevent accidents by fires; then, and in every such case, this policy shall be void. This policy may be canceled at any time at request of assured, the company retaining customary monthly short rates for time policy has been in force; it may also be canceled at any time by the company, on giving written or verbal notice to that effect, and refunding or tendering a rateable proportion of the premium for the unexpired term of the policy. In case of loss the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire; the occupancy of the building insured or containing the property insured; other insurance, if any, and copies of all policies; the whole value and ownership of the property, and the amount of loss or damage; and shall produce the certificate under seal of a magistrate, notary public, or com-
60 missioner of deeds nearest the place of the fire, and not concerned in the loss or related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount claimed by the said assured. In no case shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire, nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies, and without reference to the solvency or the liability of other insurers. Assignors, unless the assignee owns the property, must make the proofs hereby required. If required, the assured shall produce books of account and other proper vouchers, original or duplicate invoices, and all property hereby insured, whether damaged or not damaged, and be examined under oath by any person appointed by the company, touching all questions by him deemed pertinent to the loss, and subscribe such examination, when reduced to writing; and a refusal to answer
61 such questions and subscribe such examination, when reduced to writing, shall cause a forfeiture of all claims under this policy. Damage to property not totally destroyed, unless the amount of said damage is agreed upon between the assured and the company shall be

appraised by disinterested and competent persons, mutually agreed upon by the parties; when personal property is damaged the assured shall put it in best order possible, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised; and the detailed report of the appraisers in writing, under oath, shall form a part of the proofs hereby required, each party paying one-half the expense of the appraisal; and until such proof and certificates are produced, and examination and appraisal permitted, the loss shall not be payable. And the company reserves the right to take any part, or all, of the property appraised, paying market value therefor in case the damage as appraised is deemed excessive. Any fraud, or attempt at fraud, or any false swearing on the part of the assured, shall cause a forfeiture of all claim under this policy.

62 Re-insurance to be on the basis that in no event will this company be liable for a sum greater than such portion hereby re-insured bears to the whole sum by the company re-insured; and in case of loss this company to pay pro rata, at and in the same time and manner as the company re-insured.

It is expressly covenanted by the parties hereto, that no suit or action against this company for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery, unless commenced within twelve months next after the loss shall have occurred; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding; and it is further expressly covenanted by the parties hereto, that no officer, agent, or representative of this company shall be held to have waived any of the terms and conditions of this policy, unless such waiver shall be endorsed hereon in writing.

N. B. Books of accounts, securities for money, evidences of debt, deed, money, bullion, plate, jewels, medals, engravings, paintings,
63 sculptures, ornaments, musical and scientific instruments, models and curiosities; frescoes or wall decorations exceeding in value five dollars per square yard, are not insured unless particularly mentioned in the policy. Plate-glass doors and windows, when the plates are of the dimension of nine square feet, or more, are not insured under the within policy, unless separately and specifically mentioned.

This policy is made and accepted upon the above express conditions, but shall not be valid unless countersigned by the duly authorized agent of the Hartford Fire Insurance Company at Evanston, Ills.

In witness whereof the said Hartford Fire Insurance Company have caused these presents to be signed by their president and attested by their secretary, in the city of Hartford and State of Connecticut.

GEO. L. CHASE,
President.

J. D. BROWNE,
Secretary.

Countersigned at Evanston, Ills., this 1st day of December, 1871.

J. R. FOWLER, *Agent.*

64 This policy is not assignable for purposes of collateral security, but in all such cases it is to be made "payable in case of loss," etc., by endorsement on its face. In case of actual sale or trans-

fer of title, leave being previously obtained, the form subjoined may be used, which must be executed at the time of said transfer:

The property hereby insured having been purchased by H. W. Shacker, The Hartford Fire Insurance Company consent that the interest of $1,400, O. P. Austin, in the within policy, may be assigned to said purchaser, subject nevertheless to all the terms and conditions therein mentioned and referred to.

Dated at Evanston this twenty-eighth day of September, 1872.

——— ———, *Agent.*

For value received I hereby transfer, assign, and set over unto H. W Shacker and his assigns, all my right, title, and interest in this policy of insurance, and all benefit and advantage to be derived therefrom.

Witness my hand and seal this 28th day of Sept., 1872.

O. P. AUSTIN.

Sealed and delivered in presence of
GEO. E. SAWYER.

65 The witness also produced a deed, executed by him to John Frahen, dated January 20th, 1873, as follows, with acknowledgment:

Deed.

This indenture, made this twentieth day of January, in the year of our Lord one thousand eight hundred and seventy-three, between Henry W. Schacker, of Evanston, of the county of Cook and State of Illinois, party of the first part, and John Frahen, of the same place, of the county of Cook, and State of Illinois, of the second part:

Revenue-stamp duties. For every $500 or fractional part, 50 cents.

Witnesseth that, whereas O. P. Austin, of Evanston, of the county of Cook, and State of Illinois, did sell, by *a* his certain mortgage-deed, dated the eighteenth day of September, 1871, which deed is recorded in the recorder's office of the county of Cook, in the State of Illinois, on the eleventh day of May, A. D. 1872, in book 25 of records, at page 552, and convey to the said party of the first part all the premises, lot, piece, or parcel of land hereinafter described, to secure the payment of his certain two promissory notes in said deed particularly mentioned, and upon certain trusts in said deed of mortgage particularly declared, reference thereto being had; and whereas default hath been made in the payment of both of said two promissory notes,
66 the said premises were by said party of the first part duly advertised for public sale at the east door of the court-house, on Clark, between Randolph & Washington sts., Chicago, in the county of Cook and State of Illinois, on the twentieth day of January, A. D. 1873, at 11 o'clock a. m. of said day, in the manner prescribed by said mortgage-deed, and were upon the day and year and at the place last mentioned aforesaid, in pursuance of said notice, sold at public sale, and at said sale the said party of the second part was the highest and best bidder therefor, and bid for the tract first hereinafter named the sum of eleven hundred and twenty-five (1,125) dollars, which was the highest and best bid offered for said premises, and which sale was made and publicly declared to be subject to the claim of the Northwestern University, upon said lots, for the purchase-money thereof:

Now, therefore, these presents witness, that the said party of the first part, in pursuance of the power and authority in him vested in and by the said mortgage-deed, and in consideration of the sum of one dol-

lar, and also the further sum of eleven hundred and twenty (so bid) dollars, to the said party of the first part paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath and doth hereby convey, remise, release, and quit-claim to the said party of the second part, his heirs and assigns forever, all the right, title, and interest, as well in law as in equity, which the said party
67 of the first part hath acquired by virtue of the mortgage-deed above mentioned, of, in, and to all that certain tract, piece or parcel of land, situated in the Evanston, county of Cook and State of Illinois, and described as follows, to wit:

The north half of lot nine (9) in block two, (2,) being the north fifty feet of lot nine (9) in said block two, (2,) in the village of Evanston. The said lot above described being otherwise known and now designated as lot number twenty-two (22) in the subdivision of block two (2) aforesaid.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining, and the reversions, remainders, rents, issues, and profits thereof; and also all the estate, right, title, interest, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, and to the same, and any and every part thereof, with the appurtenances which the said party of the first part acquired by virtue of said mortgage-deed.

To have and to hold the aforesaid right, title, and interest of the said party of the first part, unto the said party of the second part, his heirs and assigns forever, as full and absolutely as the said party of the first part can by virtue of the power and authority in him by said deed vested, convey the same.

In witness whereof, the party of the first part hath hereunto
68 set his hand and seal the day and year first above written.

H. W. SCHACKER.

Sealed and delivered in presence of—

STATE OF ILLINOIS,
Cook County, ss:

On the twenty-first day of March, eighteen hundred and seventy-three, before me, John L. Manning, a notary public of the county of Cook, in the State of Illinois, appeared Henry W. Schacker, personally known to me to be the real person whose name is subscribed to the foregoing instrument of writing, as having executed the same, and then acknowledged the execution thereof as his free act and deed, for the uses and purposes herein mentioned.

[SEAL.] JOHN L. MANNING,
Notary Public.

And says: This is the deed executed upon the foreclosure of the mortgage. I think I had this deed when I had these interviews with Fowler; but it may have been in the office of D. J. Crocker, the lawyer who attended to foreclosing the mortgage.

The building described in the policy and in the mortgage was destroyed by fire on Sunday, the 27th day of April, 1873. I immediately gave notice to the agent Fowler, and presented proofs of loss in
69 my own name. It is admitted that the proofs of loss were sufficient and were presented in apt time, on the day of May, 1873, amounted to seventeen hundred dollars, ($1,700.)

The only objection to paying it, I heard, made at the office of deft. was, that I had sold my interest and did not own the building at the time of

the loss. The facts are, I made a contract to sell to one Judson; he did not comply with it, and we gave it up. This was on the 1st April, 1873; afterwards, on the 26th April, 1873, I took a deed from Frahen and leased the premises to a party who was cleaning up the house when it was destroyed by fire. The witness produced the deed from Frahen to him, which is as follows:

Quit-claim deed.

The grantors, John Frahen and Margarette Frahen, his wife, of the town of Evanston, in the county of Cook and State of Illinois, for the consideration of two thousand ($2,000) dollars, convey and quit-claim to Henry W. Schacker, of the town of Evanston, county of Cook, and State of Illinois, all interest in the following-described real estate, to wit:

The north half of lot nine, (9,) in block two, (2,) being the north fifty feet of lot nine, (9,) in said block two, (2,) in the village of Evanston; the said lot above described being otherwise known and now de-
70 signated as lot number twenty-two, (22,) in the subdivision of block two (2) aforesaid, situated in the county of Cook in the State of Illinois, hereby releasing and waiving all rights under and by virtue of the homestead exemption laws of this State.

Dated this 26th day of April, A. D. 1873.

Signed, sealed, and delivered in presence of—

JOHN FRAHEN.
MARGRET FRAHEN.

STATE OF ILLINOIS,
Cook County, ss:

I, G. M. Huntoon, notary public in and for the said county, in the State aforesaid, do hereby certify that John Frahen and Margerett Frahen, his wife, who are personally known to me to be the same persons whose names are subscribed to the foregoing instrument, appeared before me this day, in person, and acknowledged that they signed, sealed, and delivered the said instrument as their free and voluntary act, for the uses and purposes therein set forth, including the release and waiver of the right of homestead.

Given under my hand and notarial seal this 26th day of April, A. D. 1873.

[SEAL.]

G. M. HUNTOON,
Notary Public.

71 Cross-examination:

The policy was the only paper I had with me when I went to see Fowler. I asked him to sign his name to the consent to the assignment. He refused and did not sign the consent; gave as a reason why he could not sign that Austin had dated the assignment too long before. There was no talk as to Austin's title. He talked some of buying the property of me, and said he would buy it if I wanted to sell it. I will not swear that Fowler at that interview said he knew as to Austin's title. The deed made by me to Frahen, under the mortgage, was not delivered by me to Frahen until April 26th, 1873, the date of the acknowledgment of Frahen's deed to me. Frahen never had it until he made the quit-claim deed in April. The mortgage-sale took place on February 20th, 1873, the day before I went to see Fowler. Why the deed to Frahen was dated in January before I can't say.

JOHN FRAHEN, called on part of plaintiff and sworn, testified:

I executed this deed (the deed last above alluded to as executed by John Frahen) and my wife. I paid nothing for the land at the sale of it to me. I acted in that matter as agent for the plaintiff. I had this deed (the one to him from Schacker) in my possession. I think I got it about its date. I see it is acknowledged by the certificate endorsed on
72 it the 21st March, 1873. I may not have had it before.

Cross-examination:

I got my deed from Schacker some time after the sale to me. At the same time I conveyed back to Schacker I attended the sale and bid it in for Schacker. I went with Schacker to see Fowler about a month before I got my deed from Schacker. There was nothing said about Austin's title at that time.

And the said defendant, to maintain the issues on its part, called J. R. FOWLER, who, being duly sworn, testified, on being shown the policy of insurance introduced by the plaintiff:

I am the agent alluded to in it, and signed the writing on the face of it, at the date, Feb'y 21, 1873. Schlacker, the plaintiff, came to me with it. We had some talk about the assignment endorsed on it. He said he had a mortgage from Austin mentioned in the policy, and had sold the property under it to Frahen for his (Schacker's) benefit; that Frahen had bid the property off for him, but he had no deed. I talked some with him (Schacker) about buying the property, but did not know anything about Austin's title; supposed his (Austin's) title was good, except this mortgage. I told Schacker that I could not consent for the company to the assignment by Austin to him. It was dated so far back, in September, 1872, the rules of the company would not allow me
73 to do it. I told him that as his title was *incohate*, and not yet perfected to protect his interest. I would make the loss, if any, payable to him, and had put the writing upon the face of it, which is there now (alluding to the policy in evidence) signed by me.

When Schacker came to me I asked him if he owned the property, and he said no. Then I told him that I could not consent to an assignment unless the title was in him; that the only thing I could do was to insert "loss payable," &c., and that if he had any interest, he would be paid in case of loss, and if he had no interest it would amount to nothing. I told him that when he got a title if he would then come to me I would then fix the matter up; that what I had written on it would protect him in the mean time. He informed me he had a mortgage, and it was in process of foreclosure. There was not a word said between us about Austin's title. I did not state to him that I knew all about Austin's title. All the knowledge I then had was that I supposed Austin had a deed of the property, and owned it. I did not know, nor had I been informed by Austin, or any one, at any time, that Austin's title was less than a fee-simple in the land and the building on it. At the time Schacker came to me, and we had our talk, I supposed that Austin owned the property absolutely, and had given a mortgage to Schacker. I never saw nor knew of the contents of the mortgage until pro-
74 duced here in court. I did not state to Schacker that I was agent for Austin, and knew about his title. I made no such statement. I did not go to see Schacker about buying the property until some time in April, and then I went on behalf of another man. I was looking up property for a friend who had applied to me for that purpose after the time when Schacker came to see me. I was a real estate as

well as an insurance agent. I did not know, when the policy was issued, that Austin's title was less than a fee, nor did he communicate any such information to me. Nothing was paid by Schacker for writing in the words "loss, if any, payable," &c., in the policy. I had no knowledge that there was any mortgage on the property until Schacker so stated when he brought the policy to me.

I had some conversations afterwards with Schacker in the presence of Frahen, but no contract for the purchase of the premises by me was ever consum'ated.

It was admitted by the plaintiff, and evidence thereof waived, that the only title said assured O. P. Austin ever had in the land on which the building stood was a contract for the purchase of the land which had never been fully paid; that he had no deed, and that his title was less than a fee-simple estate.

Which was all the testimony in the cause given on either side, and thereupon the court after argument *had* took the case under advisement.

75 And afterwards, on the 6th day of August, 1874, being one of the days of said July term, again came the parties by their counsel, and the court doth find the issues herein for the defendant and files his special findings herein as follows: This cause having been submitted to the court for trial without the intervention of a jury, by the written stipulation of the parties, the court doth find from the evidence the following facts: 1st. That on the 1st day of December, 1871, said defendent issued to O. P. Austin its policy of insurance, whereby, for the certain premium therein mentioned, defendant insured said Austin for the term of five years, in the sum of fourteen hundred dollars on his dwelling-house, situated on block 2, in the town of Evanston. 2d. That the policy of insurance contained the following condition: "Or if the insured is not the sole, absolute, and unconditional owner of the property, or (if said property be a building or buildings) of the land on which said building or buildings stand by a title in fee-simple, and this fact is not expressed in the written portion of the policy * * * * then,

76 and in every such case, said policy shall be void." Said policy also contained a clause declaring that it should not be assignable without the assent of the defendant duly endorsed thereon in writing. 3d. That at the time of the issue of said policy said Austin was not seized of a fee-simple title in the lot on which said building was situate, but on the contrary the fee of said lot was in the Northwestern University, and said Austin held a contract from said Northwestern University whereby he was to receive a conveyance of said lot in fee when he should make certain payments and perform certain covenants in said contract set forth. And the special character of said Austin's interest in said lot was not set forth in the written part of said policy, nor noted upon said policy, and in fact neither said defendant or its agent issuing said policy were aware of the special nature of Austin's title at the time said policy was issued. 4th. That on the day of September, 1871, said Austin being indebted to plaintiff, mortgaged his interest in said lot & building to plaintiff in due form, and default having been made in the payment of the indebtedness secured by mortgage, said plaintiff

77 advertised and sold said mortgaged premises at public auction under the power of sale contained in said mortgage, and one John Phram bid off said premises at said sale at the request of and for the use of said plaintiff. That after said sale, plaintiff requested one Fowler, who was the local agent of defendant at Evanston, to consent in writing on behalf of said defendant to the assignment of said policy

to plaintiff by said Austin; that said agent refused to endorse such assent upon said policy, but stated to plaintiff that all he could do was to write into the body of said policy these words: "Loss, if any, payable to W. H. Shacker, as his interest may appear," which words were accordingly written into said policy by said agent and said policy returned to plaintiff. That said agent, at the time he wrote said clause in the policy, did not know that said Austin's or said plaintiff's title was less than a fee-simple. That after said mortgage-sale and the insertion of said words in said policy by said agent said premises were destroyed by fire, and said Schacker caused notice and proofs of said loss to be
78 furnished in due form and in apt time to said defendant. And that defendant refused payment for the reason that said policy was from its inception void by reason of the failure to properly set out the title of the assured to the *assured.*

5th. The court finds the issues for the defendant.

H. W. BLODGETT, *Judge.*

In which findings and the said special findings, and each of them, the said plaintiff then and there excepted and tendered this his bill of exceptions in the premises, now here in open court to be signed and sealed by the said judge thereof according to law, and it is accordingly so done this sixth day of August, A. D. 1874.

H. W. BLODGETT, *Judge.* [SEAL.]

(Endorsed:) Filed Sept. 1st, 1874. W. H. Bradley, clk.

79 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the foregoing to be a full, true, and complete transcript of the record and proceedings of said court in the case wherein H. W. Schacker was the plaintiff and the Hartford Fire-Insurance Company was the defendants, as appears from the original files and records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Chicago this 14th day of Sept., A. D. 1874, and of our Independence the 99th year.

[SEAL.] W. H. BRADLEY, *Clerk.*

Cl'k's fees on transcript, $31, paid.

W. H. BRADLEY, *Cl.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court before you, between Henry W. Shacker, plaintiff, and the Hartford Fire-Insurance Company, defendant, a manifest error hath happened, to the great damage of the said Henry W. Shacker, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf: You are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and prodeedings aforesaid, with all things concerning the same, to the Supreme Court of the

United States, together with this writ, so that you have the same
81 at Washington on the second Monday of October, in the year of our Lord one thousand eight hundred and seventy-four, in said Supreme Court, to be there and then held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States this first day of September, in the year of our Lord one thousand eight hundred and seventy-four and of the Independence of the United States the ninety-ninth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

82 UNITED STATES OF AMERICA, *ss:*

To the Hartford Fire-Insurance Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the second Monday of October next, pursuant to a writ of error filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, wherein Henry W. Schacker is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court of the United States this 1st day of Sept., in the year of our Lord, one thousand eight hundred and seventy-four.

THOMAS DRUMMOND.

(Indorsed:) Schacker vs. Hartford Fire-Ins. Co. Citation. S'd 7th Sept.

83 In the Supreme Court of the United States.

HENRY W. SCHACKER
vs.
THE HARTFORD FIRE-INSURANCE COMPANY. } Error.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

William T. Burgess, of Chicago, in said district, being duly sworn, says that he did, on the seventh day of September, A. D. 1874, personally serve George L. Paddock, of the firm of Paddock & Co., (who were then attorneys appearing for said defendant in said cause in the circuit court of the United States for the northern district of Illinois,) with a copy of the annexed citation, by delivering to and leaving the same with him, at the same time showing him said original.

W. T. BURGESS.

Sworn & subscribed before me this 6th day of October, A. D. 1874.
Attest my hand and notarial seal.

[NOTARIAL SEAL.] CHAS. W. TOWNSEND,
Notary Public.

(Indorsed:) Shacker vs. Hartford Fire-Ins. Co. Citation & proof service.

United States, together with this writ, so that you have the same
81 at Washington on the second Monday of October, in the year of our Lord one thousand eight hundred and seventy-four, in said Supreme Court, to be there and then held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

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W. T. BURGESS.

Sworn & subscribed before me this 6th day of October, A. D. 1874.
Attest my hand and notarial seal.

[NOTARIAL SEAL.] CHAS. W. TOWNSEND,
Notary Public.

(Indorsed:) Shacker vs. Hartford Fire-Ins. Co. Citation & proof service.

84 In the Supreme Court of the United States, of October term, A. D. 1874.

HENRY W. SCHACKER
vs.
THE HARTFORD FIRE-INSURANCE COMPANY.

In error to the circuit court of the United States for the northern district of Illinois.

And now at this day comes the said plaintiff in error, by W. T. Burgess, his attorney, and says that in the records, proceedings, and judgment aforesaid there is material error manifest of record, in this:

1st. That the court below found the issues for the defendant, and rendered judgment thereon against the plaintiff, whereas it should have found the same for the plaintiff and rendered judgment against the defendant.

2d. That the court below erred in each & all of its special findings, in this, that the facts shown by the evidence were not found according to the truth of the case as thereby proved, and the conclusions of law found by the court upon the acts as found by it are erroneous.

3d. That in particular the second finding is, that the policy of the 1st Decr., 1871, was in existence containing the agreement of the
85 parties to it, touching its subject-matter, & so continued until suit brought; whereas the facts proved show it was treated by the plaintiff & defendant as rendered void by the assignment of Sept., 1872, thereon made by said Austin, and had no vitality until re-issued on the 21st Feb'y, 1873, to the plaintiff, and modified by the endorsement placed on the face thereof at that time, coupled with the statement then made by the agent to Schacker, that if he, Schacker, had any interest it would be paid, and if he had no interest it would amount to nothing.

4th. That the finding that the agent did not when he wrote said clause in the policy know that said plaintiff's title was less than a fee-simple in the 4th finding is contrary to the evidence of the agent, who stated that Schacker told him he did not own the property.

5th. That the law upon the facts as proved is for the plaintiff.

6th. That the law upon the facts as found is for the plaintiff.

Whereupon, and for divers other errors manifest & material in said record & judgment, said plaintiff prays judgment that the same be reversed, set aside, & held for naught, and he be restored, &c.

W. T. BURGESS,
For Pff. in Error.

(Indorsement on cover:) No. 122. Henry W. Schacker, plaintiff in error, vs. The Hartford Fire-Insurance Company. N. Illinois. C. C. U. S. Filed 12th October, 1874.

84 In the Supreme Court of the United States, of October term, A. D. 1874.

HENRY W. SCHACKER
vs.
THE HARTFORD FIRE-INSURANCE COMPANY.

In error to the circuit court of the United States for the northern district of Illinois.

And now at this day comes the said plaintiff in error, by W. T. Burgess, his attorney, and says that in the records, proceedings, and judgment aforesaid there is material error manifest of record, in this:

1st. That the court below found the issues for the defendant, and rendered judgment thereon against the plaintiff, whereas it should have found the same for the plaintiff and rendered judgment against the defendant.

2d. That the court below erred in each & all of its special findings, in this, that the facts shown by the evidence were not found according to the truth of the case as thereby proved, and the conclusions of law found by the court upon the acts as found by it are erroneous.

3d. That in particular the second finding is, that the policy of the 1st Decr., 1871, was in existence containing the agreement of the
85 parties to it, touching its subject-matter, & so continued until suit brought; whereas the facts proved show it was treated by the plaintiff & defendant as rendered void by the assignment of Sept., 1872, thereon made by said Austin, and had no vitality until re-issued on the 21st Feb'y, 1873, to the plaintiff, and modified by the endorsement placed on the face thereof at that time, coupled with the statement then made by the agent to Schacker, that if he, Schacker, had any interest it would be paid, and if he had no interest it would amount to nothing.

4th. That the finding that the agent did not when he wrote said clause in the policy know that said plaintiff's title was less than a fee-simple in the 4th finding is contrary to the evidence of the agent, who stated that Schacker told him he did not own the property.

5th. That the law upon the facts as proved is for the plaintiff.

6th. That the law upon the facts as found is for the plaintiff.

Whereupon, and for divers other errors manifest & material in said record & judgment, said plaintiff prays judgment that the same be reversed, set aside, & held for naught, and he be restored, &c.

W. T. BURGESS,
For Pff. in Error.

(Indorsement on cover:) No. 122. Henry W. Schacker, plaintiff in error, vs. The Hartford Fire-Insurance Company. N. Illinois. C. C. U. S. Filed 12th October, 1874.

Abstract of Record, Statement and Brief.

SUPREME COURT OF THE UNITED STATES.

No. 122.

HENRY W. SHACKER, PLAINTIFF IN ERROR,

vs.

THE HARTFORD FIRE INSURANCE COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED

Supreme Court of the United States.

HENRY W. SCHACKER,
vs.
THE HARTFORD FIRE INSURANCE COMPANY.

ERROR TO CIRCUIT COURT.
Northern District of Illinois.

ABSTRACT OF RECORD.

Suit commenced on the 21st day of January, 1874, in the superior court of Cook county in *assumpsit*. Damages $3,000. Summons issued. Served on the defendant to the February term of that court. At that term, on the 3d Feb., 1874, on motion and petition of defendant as a citizen of Connecticut, the case was removed to the U. S. circuit court for said district, in which court the plaintiff on the 2d March, 1874, filed a

DECLARATION setting up that whereas heretofore, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and seventy-one, at Evanston, in said county of Cook, the defendant did make, issue, and deliver to one O. P. Austin its certain policy of insurance, dated that day, and did thereby, then and there, in consideration of the receipt of twenty-three dollars and ten cents, insure to said Austin, for the amount of one thousand four hundred dollars, for the term of five years, as follows, viz: "On his one-and-one-half story frame dwelling-house, situated detached on block two (2) Evanston, Cook County, Illinois," against all such immediate loss or damage sustained by the assured and his legal representatives as might occur by fire to the property specified, not exceeding the sum insured, nor the

interest of the assured in the property, except as thereinafter provided, from the first day of December, eighteen hundred and seventy-one, at 12 o'clock noon, to the first day of December, eighteen hundred and seventy-six, at 12 o'clock noon, to be paid sixty days after due notice and satisfactory proofs of the same, made by the assured, should be received at the office of the company in Hartford; it being covenanted as conditions of that contract, that the company might repair, restore, or replace the property lost or damaged, on giving notice of such intention within sixty days after the receipt of the proofs therein required, in which case the assured should furnish plans and specifications of property so lost or damaged; and in case of loss the assured should give immediate notice thereof and should render to the company a particular account of said loss under oath, stating the time, origin, and circumstances of the fire, the occupancy of the building insured or containing the property insured; other insurance, if any, and copies of all policies, the whole value and ownership of the property, and the amount of loss or damage, and should produce the certificate under seal of a magistrate, notary public, or commissioner of deeds nearest the place of the fire and not concerned in the loss or related to the assured, stating that he had examined the circumstances of the assured, and verily believed that the assured had, without fraud, sustained loss on the property insured to the amount claimed by the assured, as by the said policy of insurance, now in the possession of the said plaintiff, on reference thereto, will among other things more fully and at large appear.

And it was and is also provided in and by said policy, among other things, that if any change took place in the title or possession of the property, whether by sale, transfer or conveyance, legal process or judicial decree; or the policy should be assigned without the consent of the company endorsed thereon; or if the assured was not the sole, absolute, and unconditional owner of the property insured; or (if said property be a building or buildings) of the land on which said building stand, by a title in fee-simple, and this fact is not expressed in the written portion of the

policy, then and in every such case the said policy should be void, and that no officer, agent, or representative of the said company should be held to have waived any of the terms and conditions of said policy, unless such waiver should be endorsed thereon in writing.

And the said plaintiff further avers that under and by virtue of a certain indenture of mortgage made by the said Austin to the said plaintiff conveying the said lands, whereon said house, insured as aforesaid, stood and formed part of the freehold, to the said plaintiff, to secure to said plaintiff the payment of a certain sum of money at a certain time therein specified, with power of sale of said premises therein described by said plaintiff to satisfy the same if the same were not paid at maturity, as among other things will on reference to said mortgage more fully appear, he, the said plaintiff, did, the said money not being paid as in said mortgage provided, under and in pursuance of the powers in that behalf in said mortgage contained, and after the making of said insurance policy, sell to one John Frahm the said lands and premises for the amount due on said mortgage, and execute to him a conveyance whereby all the title, estate, and interest of said Austin in said land and premises became and where vested in him the said Frahm. That afterwards the said John Frahm,
7 not having paid the said sum of money for which said premises were struck off, sold, and conveyed to him as aforesaid by said plaintiff, and said plaintiff holding a vendor's lien for the same, executed and delivered to said plaintiff a deed conveying the said lands and premises to him in payment and satisfaction of the sum so bid; and said Austin, for a valuable consideration to him paid, did, to wit, on the 28th day of September, A. D. 1872, assign and transfer said policy of insurance to said plaintiff by writing endorsed thereon: that afterwards, and on or about the 21st of February, one thousand eight hundred and seventy-three, at Evanston aforesaid, the said plaintiff stated and made known to the agent of the said insurance company at Evanston aforesaid, to wit, J. R. Fowler, he then and there being the agent of said company, and fully authorized by it to issue its policies of insur-

ance and waive any of the conditions thereof, the said facts and circumstances touching the acquisition by said plaintiff of the title and estate of said Austin in and to the lands and premises whereon said house was standing and being, of his lien thereon and in and to said policy of insurance in manner aforesaid, and thereupon then and there the said Fowler, so being such agent as aforesaid, and being so informed, and having knowledge of the premises and of the interest of said plaintiff in the lands and premises whereon said house so insured, as aforesaid, was situated, and in said policy, and having full authority so to do, did endorse upon and write upon said policy the words following, and sign the same as the agent of said company, to wit:

"Loss, if any, payable to H. W. Schacker, as his interest may appear.

"Evanston, Feby. 21, 1873.

"J. R. FOWLER, *Agt.*"

And said plaintiff avers that thereby then and there the said policy of insurance, and the right to recover for any loss that might happen by fire to said house thereby insured, within the terms of said policy, and subject to the conditions thereof not waived in and by said statement and endorsement so placed thereon by said agent, became and was vested in said plaintiff, and he entitled to recover such loss the same as though said policy had been assigned to him with the assent of said company, and in consideration thereof the said defendant then and there undertook and promised the said plaintiff to pay him, said plaintiff, such loss or damage as he might thereafter during the life of said policy sustain, within the terms and conditions and according to the true intent and meaning thereof.

And the said plaintiff further avers that afterwards, to wit, on the day of April, A. D. 1873, the said frame dwelling-house in said policy mentioned, was destroyed by fire, it then and there being of greater value than fourteen hundred dollars, and then and there being the sole property of him, the said plaintiff, of which loss due notice and satisfactory proofs of the same were

made by the said plaintiff and received by said company at it's office in Hartford more than sixty days before the commencement of this suit, to wit, on the 15th day of May, A. D. 1873.

And the said plaintiff further avers that he did give immediate notice of said loss to said company, to wit, on the day of April, 1873, and did, to wit, on the 15th day of May, 1873, and more than sixty days before the commencement of this suit, render to the said defendant a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire, the occu-
8 pancy of the building insured, and what, if any, other insurance there was, and copies of all policies, the whole value and ownership of the property, and the amount of loss and damage, and produce the certificate, under seal of a notary public nearest the place of fire, not concerned in the loss or related to the assured, stating that he had examined the circumstances attending the loss, knew the character and circumstances of the said plaintiff, and verily believed that the said plaintiff had without fraud sustained loss on the property insured to the amount claimed by the said plaintiff, being the whole amount of fourteen hundred dollars. By means whereof the said defendant (not having given any notice of an intention to restore, replace, or rebuild the property lost and damaged as aforesaid) became and was liable to pay the said plaintiff the said sum of fourteen hundred dollars, and being so liable, in consideration thereof, then and there promised the said plaintiff to pay him the said sum of money sixty days thereafter, which period hath now elapsed, yet the said defendant to pay said sum of money to said plaintiff hath hitherto wholly refused and still refuses.

And for that, whereas, also heretofore, to wit, on the 21st day of February, A. D. 1873, at Evanston, in said district, the said defendant made and delivered to the said plaintiff its certain policy of insurance, in the words and figures substantially as follows:

"No. 898. "$1,400.

"The Hartford Fire Insurance Company, of Hartford, Conn., by this policy of insurance, in consideration of the receipt of twenty-three and $\frac{10}{100}$ dollars, do insure O. P. Austin, of Evanston,

Illinois, for the amount of one thousand four hundred dollars, for the term of five years, as follows, viz: $1,400 on his one and one-half story frame dwelling-house, situated, detached, on block two (2) Evanston, Cook County, Illinois.

Loss, if any, payable to H. W. Schacker, as his interest may appear.

Evanston, Feby. 21, 1873.

J. R. FOWLER, *Agt.*

$1,200 insured in the Merchants' of Chicago.

$1,400.00—5 years—@ 1.65%—is $28.10.

Against all such immediate loss or damage sustained by the assured and his legal representatives as may occur by fire to the property specified, not exceeding the sum insured, nor the interest of the assured in the property, except as hereinafter provided, from the first day of December, eighteen hundred and seventy-one, at 12 o'clock noon, to the first day of December, eighteen hundred and seventy-six, at 12 o'clock noon, to be paid sixty days after due notice and satisfactory proofs of the same, made by the assured, are received at the office of this company in Chicago; it being covenanted as conditions of this contract, and this company may repair, restore, or replace the property lost or damaged, on giving notice of such intention within sixty days after receipts of proofs herein required, in which case the assured shall furnish plans and specifications of property so lost or damaged; and that this company shall not be liable until the actual payment of the premium, nor for loss by theft at or after the fire, nor for loss caused by invasion, insurrection, riot, civil commotion, military or usurped power; nor for loss caused by lightning or explosions of any kind unless fire ensues, and then for the loss or damage by fire only; nor for loss or damage caused by removal of property from a building where there is no loss by fire, unless such removal was necessary to preserve the property, in
9 which case the damage shall be borne by both parties, in proportion as the whole sum insured bear' to the whole value of the property insured; nor for loss or damage caused by neglect to use all practical means to save and preserve the property from

damage at and after the fire, and there can be no abandonment to the company of the property insured.

If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this policy, and a warranty by the assured, and if the assured in a written or verbal application makes any erroneous representation or omits to make known any fact material to the risk; or if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, without the consent of the company written hereon; or if the risk be increased by any means within the control of the assured; or immediately upon the passing or entry of a decree of foreclosure, or upon a sale under a deed of trust; or if the asssured shall be adjudged a bankrupt, or if the property insured be assigned under any bankrupt or insolvent laws; or if any change take place in the title or possession of the property, whether by sale, transfer, or conveyance, legal process, or judicial decree; or the policy is assigned without consent of the company endorsed hereon; or if the assured is not the sole, absolute, and unconditional owner of the property insured, or (if said property be a building or buildings) of the land on which such building or buildings stand, by a title in fee-simple, and this fact is not expressed in the written portion of the policy; or if gunpowder, phosphorus, naphthe, benzine, gasoline, or petroleum fluid, crude earth or coal oils, are kept or used on the premises; or if camphene, burning fluid, or refined coal or earth oils are kept for sale, stored or used on the premises in quantities exceeding one barrel at any one time, without written consent; or if the premises hereby insured shall become vacated by the removal of the owner or occupant, and so remain for a period of more than fifteen days without notice to the company, and consent endorsed hereon, or for neglect or deviation from the laws or police regulations made to prevent accidents from fires, then, and in every such case, this policy shall be void. This policy may be cancelled at any time at the request of assured, the company retaining customary monthly short rates for time policy

has been in force; it may also be cancelled at any time by the company, on giving written or verbal notice to that effect, and refunding or tendering a ratable proportion of the premium for the unexpired term of the policy.

In case of loss the assured shall give immediate notice thereof, and shall render to the company a particular account of said loss, under oath, stating the time, origin, and circumstances of the fire; the occupancy of the building insured or containing the property insured, other insurance if any, and copies of all policies, the whole value and ownership of the property, and the amount of loss or damage, and shall produce the certificate, under seal of a magistrate, notary public, or commissioner of deeds, nearest the place of the fire, and not concerned in the loss or related to the insured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured to the amount claimed by the said assured. In no case shall the claim be for a greater sum than the actual damage to or cash value of the property at the time of the fire, nor shall the assured be entitled to recover of this company any greater proportion of the loss or damage than the amount hereby insured bears to the whole sum insured on said property, whether such other insurance be by specific or by general or floating policies, and without reference to the solvency or the liability of other insurers. Assignors, unless the assignee owns the property, must make the proofs hereby required. If required, the assured shall produce books of account and other proper vouchers, original or duplicate invoices, and all property hereby insured, whether damaged or nor damaged; and be examined under oath by any person appointed by the company touching all questions by him deemed pertinent to the loss, and subscribe such examination when reduced to writing; and a refusal to answer such questions and subscribe such examination, when reduced to writing, shall cause a forfeiture of all claims under this policy. Damage to property not wholly destroyed, unless the amount of said damage is agreed upon between the

assured and the company, shall be appraised by disinterested and competent persons mutually agreed upon by the parties when personal property is damaged; the assured shall put it in best order possible, and make an inventory thereof, naming the quantity and cost of each article, and upon each article the damage shall be separately appraised; and the detailed report of the appraisers in writing, under oath, shall form a part of the proofs hereby required, each party paying one-half the exprnse of the appraisal, and until such proofs and certificates are produced and examination and appraisal permitted, the loss shall not be payable. And the company reserves the right to take any part or all of the property appraised, paying market value therefor, in case the damage as appraised is deemed excessive. Any fraud or attempt at fraud, or any false swearing, on the part of the assured shall cause a forfeiture of all claim under this policy.

The insurance to be on the basis that in no event will this company be liable for a sum greater than such portion hereby re-insured bears to the whole sum insured by the company re-insured; and in case of loss this company to pay pro rata at and in the same time and manner as the company re insured.

It expressly covenanted by the parties hereto that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery unless commenced within twelve months next after the loss shall have occurred; and should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and admitted as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding. And it is further expressly covenanted by the parties hereto that no officer, agent, or representative of this company shall be held to have waived any of the terms and conditions of this policy, unless such waiver shall be endorsed hereon in writing.

N. B.—Books of accounts, securities for money, evidences of debt, deeds, money, bullion, plate, jewels, medals, engravings, paintings, sculptures, ornaments, musical and scientific instru-

ments, models and curiosities, frescoes or wall-decorations, exceeding in value five dollars per square yard, are not insured, unless particularly mentioned in the policy. Plate-glass doors and windows, when the plates are of the dimension of nine square feet or more, are not insured under the within policy, unless separately and specifically mentioned.

This policy is made and accepted upon the above express conditions, but shall not be valid unless countersigned by the duly authorized agent of the Hartford Fire Insurance Company at Evanston, Ill.

11 In witness whereof the said Hartford Fire Insurance Company have caused these presents to be signed by their president and attested by their secretary, in the city of Hartford and State of Connecticut.

GEO. L. CHASE, President.
J. R. FOWLER, Agent.

J. D. BROWNE, Secretary.

Countersigned at Evanston this 1st day of December, 1871.

And upon which policy the indorsements had theretofore been made, and were then thereon duly signed by said Austin in said policy named, to wit:

☞This policy is not assignable for purposes of collateral security, but in all such cases it is to be made "payable in case of loss," etc., by endorsement on its face. In case of actual sale or transfer of title, leave being previously obtained, the form subjoined may be used, which must be executed at the time of said transfer.

The property hereby insured having been purchased by H. W. Shacker, the Hartford Fire Insurance Company consent that the interest of $1,400 of O. P. Austin in the within policy may be assigned to said purchaser, subject, nevertheless, to all the terms and conditions therein mentioned and referred to.

Dated at Evanston this twenty-eighth day of September, 1872.

Agent.

For value received, I transfer, assign, and set over unto H.W. Shacker and his assigns all my right, title, and interest in this

policy of insurance, and all benefit and advantage to be derived therefrom.

Witness my hand and seal this twenty-eighth day of September, 1872. O. P. AUSTIN.

Sealed and delivered in the presence of—

GEO. E. SAWYER.

And said plaintiff further avers that O. P. Austin in the said policy mentioned made to said plaintiff, on or about the 18th day of September, A. D. 1871, a certain indenture of mortgage of that date, he, said Austin, at the making of said mortgage, and on the first day of December, 1871, a date mentioned in said policy of insurance, holding the land on which said building stood under a contract from the Northwestern University to him, said Austin, which said contract was and is in writing, and for a warranty deed, when he, said Austin, should have paid for the same as in and by said contract provided, and then and since and now in full force, and by said indenture did mortgage the said land to him, the said plaintiff, to secure to him, said plaintiff, the payment of a certain sum of money at the times and with the interest therein specified. with power of sale of the mortgaged premises by said plaintiff, should such sums of money or any of them not be paid when due, and which said mortgage contained a recital after the description of the land-mortgage substantially as follows: "The aforesaid promissory notes being given for labor performed and material furnished to build the house situated upon the premises hereinbefore described, (the mortgaged premises meaning.) The above specified lot is now lot number twenty-two, (22,) in the subdivision of block two, (2) is held by said Austin on a contract by the Northwestern University to him, which said contract is for a warranty deed when he, said Austin, shall have paid for the same, and he intends
12 herein to mortgage the buildings and his interest in the lot only." And the said plaintiff, the said moneys due under said mortgage not being paid when due, after the said first day of December, A. D. 1871, and before said 21st day of February, 1873, under

and in pursuance of the powers in that behalf in said mortgage contained, did advertise and sell the said land and premises to to John Frahm for a certain sum of money, to wit, the amount due on said mortgage, and thereupon did execute to him a conveyance in pursuance of such sale, whereby all the estate, title, and interest of said Austin in and to said land, house, and premises, vested in him, the said Frahm.

That afterwards, and before said 21st day of February, A. D. 1873, the said John Frahm not having at the time of said sale or afterwards paid the said sum of money for which said premises were at said sale under said mortgage struck off and sold to him, and said plaintiff having from the time of such sale held a vendor's lien on said lands and premises for the payment thereof, being a greater sum than fourteen hundred dollars, and said Frahm holding the same in trust for said plaintiff, executed and delivered to said plaintiff, in satisfaction and payment of that amount and of said trust, a deed dated the 24th day of March, 1873, releasing to him, the said plaintiff, said lands and premises, whereby the said plaintiff became an assignee of all the interest of said Austin in the said lands and premises, the house thereon, and in said policy mentioned.

That on or about the 21st day of February, A. D. 1873, at Evanston aforesaid, said plaintiff did make known to said defendant and to its agent, the said Fowler, the nature and extent of the interest and title of the said plaintiff in the land on which said house was situated, and did produce to them then and there the said mortgage and said deed to said Frahm, and said policy of insurance with the endorsement thereon as herein above set out, and said defendant and its said agent was then and there well advised of the contents of each and all of them, as well by inspection thereof as also by the statements of the contents thereof of his lien upon and of his title to said land then and there made by said plaintiff to said agent, and as hereinabove set out. And said defendant being so then and there advised of and well knowing the contents of said mortgage and deed to Frahm, and that the said plaintiff was not the sole, absolute, and unconditional owner

of the said land in fee-simple, and that he was such assignee as aforesaid, and held such interest and such lien thereon as aforesaid, did thereupon, afterwards, to wit, on the day and year and at the place last aforesaid, make, execute, deliver, and re-issue to the said plaintiff the said policy with the said writing signed by said Fowler as agent, written upon the face thereof, and did thereby then and there, in consideration of the premises, undertake and promises the said plaintiff to pay him, the said plaintiff, all such loss or damage as he might thereafter during the residue of the time for which the same was issued sustain within the terms and conditions, and according to the true intent and meaning thereof, said endorsement signed by said Fowler, being taken as part thereof.

And said plaintiff further avers that afterwards, to wit, on the first day of April, A. D. 1873, he then and there owning the interest in the land on which said house was situated, and of the said house as aforesaid, the said house was destroyed by fire, it then and there being of greater value than fourteen hundred dollars, and said plaintiff thereby sustained loss and damage to a large sum of money, to wit, the sum of two thousand dollars and upwards, of which loss due notice and satisfactory proofs were made by the said plaintiff and received by said defendant at its office in Hartford more than sixty days before the commence-
13 ment of this suit, to wit, on the 15th day of May, 1873.

And said plaintiff further avers that he did give immediate notice of said loss to said defendant, to wit, on the day of April, 1873, and did, to wit, on the 15th day of May, A. D. 1873, and more than sixty days before the commencement of this suit, render to the said defendant a particular account of said loss under oath, stating the time, origin, and circumstances of the fire, the occupancy of the building insured, what, if any, other circumstances there was, and copies of all policies, the whole value and ownership of the property and the amount of loss and damage, and produced the certificate under seal of a notary public nearest the place of fire and not concerned in the loss or related to the assured, stating that he had examined the

circumstances attending the loss, knew the character and circumstances attending the loss, knew the character and circumstances of the said plaintiff, and verily believed that the said plaintiff had without fraud sustained loss on the property insured to the amount claimed by the said plaintiff, being the whole amount of fourteen hundred dollars.

By means of which said several premises the said defendant then and there, to wit, on the 15th day of May, A. D. 1873, at Evanston aforesaid, became and was liable to pay said plaintiff the said sum of fourteen hundred dollors in said policy mentioned, and being so liable, in consideration thereof, afterwards, to wit, on the day and year, and at the place last aforesaid, undertook and promised the said plaintiff to pay him the said sum of money in sixty days thereafter, which period has now elapsed, yet the said defendant, although often requested so to do, hath hitherto neglected and refused to pay the same to the said plaintiff, and still both neglect and refuse, to wit, at Evanston aforesaid.

To the damage of she said plaintiff three thousand dollars, therefore this suit, &c.

Plea general issue, (special pleas withdrawn, p. 47).

Jury waived and cause submitted to the court, H. W. Blodgett, judge, for trial.

17 *Bill of Exceptions.*

This cause now came on for hearing and trial before him, and the parties having also agreed in open court that the issues of 18 fact in the case should be submitted to the court, with the privilege to each party to amend, if necessary, upon the facts proven, either as to parties or statement of cause of action or defense; and that the special pleas be and were withdrawn, with leave to the defendant to show under the general issue any mat.er of defence.

The plaintiff thereupon, to maintain the issues on his part, introduced the following proofs, to wit:

HENRY W. SCHACKER, being first duly sworn, testified as follows: I am the plaintiff in this suit. I know O. P. Austin. On

or about the 18th day of August, 1871, he made this mortgage to me.

Witness produces mortgage, and it is read in evidence, as follows, to wit: (Here insert.)

19 *Mortgage*, dated 18th Sept., 1871, by O. P. Austin, to H. W. Schacker, to secure two notes, one for $800, due Nov. 12, 1871, and one for $400, due April 1, 1872, to Schacker, with ten per cent. Conveys N. ½ Lot 9, Block 2, Evanston, "held by Austin on a contract of the North Western University to him, which said contract is for a warrantee deed, when the said Austin shall have paid for the same, and he intends herein to mortgage the buildings and his interest in the lot only." Contains power of sale on non-payment of notes. Is duly acknowledged. The witness then says:

20 I built a house for him on the premises described in it, and that mortgage was given to me to secure me for what was left unpaid for building it. Austin did not pay the mortgage, and about the 28th September, 1872, he assigned to me this policy of insurance in writing upon it. (Witness here produces a policy of insurance issued by the defendant.) This assignment was signed by said Austin to further secure what he owed me. It is a printed blank endorsed on the policy, and was filled by Austin in his own handwriting. Austin also filled up the printed blank on it for the agent to sign, as the consent of the company, except the words "O. P. Austin." I know J. R. Fowler, the agent of the defendant at Evanston. On the 21st February, 1873, I took this policy with this assignment made by Austin, and the other blank, as filled up by him, Austin, to said Fowler to get his consent as agent to the assignment. I told him I had a mortgage from Austin; had had it foreclosed by sale under the power to John Frahm, for me, and that he was to convey it to me by quit-claim deed, and whenever I asked him. I did not have the mortgage or papers with me—only the policy.

There was nothing said about Austin's title. Fowler said he knew what Austin's title was, and we began to talk about his Fowler) buying the property for me. He said he could not at-

tend to fixing up the policy then, and to call again that evening about it. I saw him again that day. He had written the words "O. P. Austin" in the consent blank which I have alluded to above. He said at this second interview that he could not sign the consent endorsed upon the policy, because the assignment had been made such a length of time, being dated in September, 1872, but that he would fix it up so as to protect my interests, or make it all right for me to make the loss, if any should happen, payable to me, so that I should not lose anything; that he could put it on the face of it, which was the best he could do for me.

He then produced the policy to me and wrote these words on the face of it: "Loss, if any, payable to H. W. Schacker, as his interest may appear.

"Evanston, Feb'y 21, 1873.

"J. R. FOWLER, *Agt.*"

We had some further talk a few days afterwards about his buying the property, but we concluded no bargain. John Frahm was present at the last of these conversations. No one but myself and Fowler were present on the 21st February, 1873. Fowler knew then what my title from Austin was under the mortgage I held, and he said he knew what Austin's title was. The insurance policy and the writings upon the face and back of it, alluded to by the witness, are as follows, to wit:

This policy is set out in 2d Cout. p. 8–10.

The witness also produced a DEED executed by him to John
24 Frahm, dated Jan'y 20, 1873, by which, after reciting that under the power of sale contained in the mortgage from Austin to Schacker, he for non-payment of the notes, had on the day of its date sold the lands described in it to Frahm, and thereby conveyed the same to him.

25 And says: This is the deed executed upon the foreclosure of the mortgage. I think I had this deed when I had these interviews with Fowler; but it may have been in the office of D. J. Crocker, the lawyer who attended to foreclosing the mortgage.

The building described in the policy and in the mortgage was destroyed by fire on Sunday, the 27th day of April, 1873. I

immediately gave notice to the agent Fowler, and presented proofs of loss in my own name. It is admitted that the proofs of loss were sufficient and were presented in apt time on the day of May, 1873, amounted to seventeen hundred dollars, ($1,700.)

The only objection to paying it, I heard, made at the office of deft. was, that I had sold my interest and did not own the building at the time of the loss. The facts are. I made a contract to
26 sell to one Judson ; he did not comply with it, and we gave it up. This was on the 1st April, 1873 ; afterwards, on the 26th April, 1873, I took a deed from Frahm and leased the premises to a party who was cleaning up the house when it was destroyed by fire. The witness produced the deed from Frahm to him, which is as follows :

Quit-claim deed, dated April 26, 1873, from John Frahm and wife to Schacker, for $2,000. Conveys N. ½, bl'k 9, bl'k 2, Evanston.

Cross-Examination.

The policy was the only paper I had with me when I went to see Fowler. I asked him to sign his name to the consent to the assignment. He refused and did not sign the consent ; gave as a reason why he could not sign that Austin had dated the assignment too long before. There was no talk as to Austin's title. He talked some of buying the property of me, and said he would buy it if I wanted to sell it. I will not swear that Fowler at that interview said he knew as to Austin's title. The deed made by me to Frahm, under the mortgage, was not delivered by me to Frahm until April 26th, 1873, the date of the acknowledgment of Frahm's deed to me. Frahm never had it until he made the quit-claim deed in April. The mortgage-sale took place on February 20th, 1873, the day before I went to see Fowler. Why the deed to Frahm was dated in January before I can't say.

JOHN FRAHM, called on part of plaintiff and sworn, testified:

I executed this deed (the deed last above alluded to as executed by John Frahm) and my wife. I paid nothing for the land at

the sale of it to me. I acted in that matter as agent for the plaintiff. I had this deed (the one to him from Schacker) in my possession. I think I got it about its date. I see it is acknowledged by the certificate endorsed on it the 21st March, 1873. I may not have had it before.

Cross-Examination.

I got my deed from Schacker some time after the sale to me. At the same time I conveyed back to Schacker I attended the sale and bid it in for Schacker. I went with Schacker to see Fowler about a month before I got my deed from Schacker. There was nothing said about Austin's title at that time.

And the said defendant, to maintain the issues on its part, called J. R. FOWLER, who, being duly sworn, testified, on being shown the policy of insurance introduced by the plaintiff:

I am the agent alluded to in it, and signed the writing on the face of it, at the date, Feb'y 21, 1873. Schlacker, the plaintiff, came to me with it. We had some talk about the assignment endorsed on it. He said he had a mortgage from Austin mentioned in the policy, and had sold the property under it to Frahm for his (Schacker's) benefit; that Frahm had bid the property off for him but he had no deed. I talked some with him (Schacker) about buying the property, but did not know anything about Austin's title; supposed his (Austin's) title was good, except this mortgage. I told Schacker that I could not consent for the company to the assignment by Austin to him. It was dated so far back, in September, 1872, the rules of the company would not allow me to do it. I told him that as his title was *incohate*, and not yet perfected to protect his interest, I would make the loss, if any, payable to him, and had put the writing upon the face of it, which is there now (alluding to the policy in evidence) signed by me.

When Schacker came to me I asked him if he owned the property, and he said no. Then I told him that I could not consent to an assignment unless the title was in him; that the only thing I could do was to insert "loss payable," &c., and that if he had

any interest, he would be paid in case of loss, and if he had no interest it would amount to nothing. I told him that when he got a title if he would then come to me I would then fix the matter up; that what I had written on it would protect him in the mean time. He informed me he had a mortgage, and it was in process of foreclosure. There was not a word said between us about Austin's title. I did not state to him that I knew all about Austin's title. All the knowledge I then had was that I supposed Austin had a deed of the property, and owned it. I did not know, nor had I been informed by Austin, or any one, at any time, that Austin's title was less than a fee-simple in the land and the building on it. At the time Schacker came to me, and we had our talk, I supposed that Austin owned the property absolutely, and had given a mortgage to Schacker. I never saw or knew of the contents of the mortgage until produced here in court. I did not state to Schacker that I was agent for Austin, and knew about his title. I made no such statement. I did not go to see Schacker about buying the property until some time in April, and then I went on behalf of another man. I was looking up property for a friend who had applied to me for that pur-
28 pose after the time when Schacker came to see me. I was a real estate as well as an insurance agent. I did not know, when the policy was issued, that Austin's title was less than a fee, nor did he communicate any such information to me. Nothing was paid by Schacker for writing in the words "loss, if any, payable," &c., in the policy. I had no knowledge that there was any mortgage on the property until Schacker so stated when he brought the policy to me.

I had some conversations afterwards with Schacker in the presence of Frahm, but no contract for the purchase of the premises by me was ever consummated.

It was admitted by the plaintiff, and evidence thereof waived, that the only title said assured O. P. Austin ever had in the land on which the building stood was a contract for the purchase of the land which had never been fully paid; that he had no deed, and that his title was less than a fee-simple estate.

Which was all the testimony in the cause given on either side, and thereupon the court after argument had took the case under advisement.

And afterwards, on the 6th day of August, 1874, being one of the days of said July term, again came the parties by their counsel, and the court doth find the issues herein for the defendant and files his special findings herein as follows: This cause having been submitted to the court for trial without the intervention of a jury, by the written stipulation of the parties, the court doth find from the evidence the following facts: 1st. That on the 1st day of December, 1871, said defendant issued to O. P. Austin its policy of insurance, whereby, for the certain premium therein mentioned, defendant insured said Austin for the term of five years, in the sum of fourteen hundred dollars on his dwelling-house, situated on block 2, in the town of Evanston. 2d. That the policy of insurance contained the following condition: "Or if the insured is not the sole, absolute, and unconditional owner of the property, or (if said property be a building or buildings) of the land on which said building or buildings stand by a title in fee-simple, and this fact is not expressed in the written portion of the policy * * * * then, and in every such case, said policy shall be void." Said policy also contained a clause declaring that it should not be assignable without the assent of the defendant duly endorsed thereon in writing. 3d. That at the time of the issue of said policy said Austin was not seized of a fee-simple title in the lot on which said building was situate, but on the contrary the fee of said lot was in the Northwestern University, and said Austin held a contract from said Northwestern University whereby he was to receive a conveyance of said lot in fee when he should make certain payments and perform certain covenants in said contract set forth. And the special character of said Austin's interest in said lot was not set forth in the written part of said policy, nor noted upon said policy, and in fact neither said defendant or its agent issuing said policy were aware of the special nature of Austin's title at the time said policy was issued 4th. That on the day of September, 1871, said Austin being

indebted to plaintiff, mortgaged his interest in said lot and building to plaintiff in due form, and default having been made in the payment of the indebtedness secured by mortgaged, said plaintiff advertised and sold said mortgaged premises at public auction under the power of sale contained in said mortgage, and one John Frahm bid off said premises at said sale at the request of and for the use of said plaintiff. That after said sale, plaintiff requested
29 one Fowler, who was the local agent of defendant at Evanston, to consent in writing on behalf of said defendant to the assignment of said policy to plaintiff by said Austin; that said agent refused to endorse such assent upon said policy, but stated to plaintiff that all he could do was to write into the body of said policy these words: "Loss, if any, payable to W. H. Schacker, as his interest may appear," which words were accordingly written into said policy by said agent and said policy returned to plaintiff. That said agent, at the time he wrote said clause in the policy, did not know that said Austin's or said plaintiff's title was less than a fee-simple. That after said mortgage-sale and the insertion of said words in said policy by said agent said premises were destroyed by fire, and said Schacker caused notice and proofs of said loss to be furnished in due form and in apt time to said defendant. And that defendant refused payment for the reason that said policy was from its inception void by reason of the failure to properly set out the title of the assured to the *assured.*

5th. The court finds the issues for the defendant.

H. W. BLODGETT, *Judge.*

To which findings and the said special findings, and each of them, the said plaintiff then and there excepted and tendered this his bill of exceptions in the premises, now here in open court to be signed and sealed by the said judge thereof according to law, and it is accordingly so done this sixth day of August, A. D. 1874.

H. W. BLODGETT, *Judge.* [SEAL.]

(Endorsed:) Filed Sept. 1st, 1874. W. H. Bradley, clk.

31 *Assignment of Errors.*

1st That the court below found the issues for the defendant, and rendered judgment thereon against the plaintiff, whereas it should have found the same for the plaintiff and rendered judgment against the defendant.

2d. That the court below erred in each and all of its special findings, in this, that the facts shown by the evidence were not found according to the truth of the case as thereby proved, and the conclusions of law found by the court upon the facts as found by it are erroneous.

3d. That in particular the second finding is, that the policy of the 1st Dec'r, 1871, was in existence containing the agreement of the parties to it, touching its subject-matter, and so continued until suit brought; whereas the facts proved show it was treated by the plaintiff and defendant as rendered void by the assignment of Sept., 1872, thereon made by said Austin, and had no vitality until re-issued on the 21st Feb'y, 1873, to the plaintiff, and modified by the endorsement placed on the face thereof at that time, coupled with the statement then made by the agent to Schacker, that if he, Schacker, had any interest it would be paid, and if he had no interest it would amount to nothing.

4th. That the finding that the agent did not when he wrote said clause in the policy know that said plaintiff's title was less than a fee-simple in the 4th finding is contrary to the evidence of the agent, who stated that Schacker told him he did not own the property.

5th. That the law upon the facts as proved is for the plaintiff.

6th. That the law upon the facts as found is for the plaintiff.

Whereupon, and for divers other errors manifest and material in said record and judgment, said plaintiff prays judgment that the same be reversed, set aside, and held for naught, and he be restored, &c.

W. T. BURGESS,

For Pff. in Error.

Supreme Court of the United States.

HENRY W. SCHACKER,
vs.
THE HARTFORD FIRE INSURANCE COMPANY.

STATEMENT AND BRIEF.

[*The pages referred to are those of the printed record.*]

On the 1st day of December, 1871, the defendant through its agent *J. R. Fowler*, at Evanston, Illinois, issued its policy of insurance of that date to *O. P. Austin*, whereby, in consideration of $23.10 it insured him for the term of five years to the sum of $1,400 on his one and one-half story frame dwelling house on Block two, Evanston, Ills,, against loss or damage by fire—not exceeding sum insured nor the interest of the assured. The policy, p. 9, contains, among other conditions, one that "if the assured is not the sole, absolute and unconditional owner of, if said property be a building or buildings, the land on which such building or buildings stand by a title in fee simple, and this fact is not expressed in the written portion of the policy," it "should be void," and further that it might be cancelled at any time at the request of the assured, the Company retaining customary monthly short rates for time policy had been in force.

Austin employed the plaintiff to build this house for him, and not being able to pay him on the 18th Sept., 1871, gave him a mortgage to secure his two notes amounting to $1200, the last due April 1, 1872, on the land on which the house insured was

situate, stating in it that the notes were given for labor performed and materials furnished for the house, and that the title to the land was held by Austin under a contract with the Northwestern University, and that he intended only to mortgage the building and his interest in the land.

Sept. 28, 1872, (p. 24) Austin not having paid his notes, assigned this policy in writing indorsed upon it to Shacker the plaintiff. On the 20th January, Shacker, under the power of sale contained in the mortgage, forecloses it and sells the property to Frahm for his, Shacker's, use, but this deed is not acknowledged until 21st March, 1873.

On the 21st February, 1873, Shacker produces the policy assigned to him by Austin to Fowler the Agent to consent to its assignment to him and indorse it on the policy. This Fowler refuses to do, but writes upon it, "Loss, if any, payble to H.W. Shacker as his interest may appear.

Evanston, Feb. 21, 1873. J. R. FOWLER, Agent"

Frahm, who bought the property at the sale under the mortgage on the 26th April, quit-claims it to Shacker, by deed dated and acknowledged that day.

On the 27th April, the building was destroyed by fire, loss duly proved to $1.800, and the only question in the case grows out of the title to the land on which the building stood; the defendant insisting that the policy was void because Austin had no title. The plaintiff conceding that, contends that the transactions of the 21st February, 1873, between the agent Fowler and the plaintiff constituted a re-issue of the policy to the plaintiff, and *Fowler knew that his title was not that of a fee simple.*

The agent Fowler, at p. 27, states that "when Shacker came to me I asked him if he owned the property, and he said, No. Then I told him that I could not consent to an assignment unless the title was in him; that the only thing I could do was to insert 'loss payable, &c.,' and that if he had any interest he would be paid in case of loss, and if he had no interest it would amount to nothing."

Now in the 4th finding of the court occurs this language,

"That said Agent at the time he wrote said clause [loss if any payable, &c.] in said policy did not know that said Austin's or *plaintiffs* title was less than a fee simple. That after said mortgage sale and the insertion of the words in said policy by said agent, said premises were destroyed by fire, and said Shacker caused notice and proofs of loss to be furnished in due form and in apt time to said defendant, and that defendant refused payment for the reason of the failure to properly set out the title of the assured to the property."

1st. The agent says he did know the title was not in fee, for *he* says Shacker told him so.

2d. The language of the contract itself imports that the title was not in fee. If the parties understood that his title was in fee, the words "as his interest may appear" are utterly without sense or meaning, because his title does appear, he owns the property.

3d. The policy does not require the nature and extent of his title, if less than a fee, *to be stated.* It says: "this fact is not expressed." What fact? That "the assured is not the sole, absolute and unconditional owner of the property insured, (or if said property be a building or buildings) of the land on which such building or buildings stand by a title in fee simple," but it does not require that what his title is, if less than a fee, shall be stated or set out. Now the finding is that defendant refused payment for the reason of the failure to *set out the title* of the assured to the property. But the policy nowhere requires that, and if it did that would be waived by the language used by the agent on the 21st Feb'y, 1873, and incorporated in the policy. So that the finding of the court is clearly for the defendant upon a matter not required by the policy.

It will be borne in mind that the policy provides that the policy (p. 22) may be cancelled by either party, and the premium or a rateable part of it refunded.

If the policy were void in Austin's hands, because his title was less than the fee, then the assignment to the plaintiff indorsed upon it carried the right to a re-payment of the whole of the

premium; or if the agent in ignorance of that was still willing to insure to Schacker, who, knowing what his title was, tells the agent it is less than a fee, and the agent continues it, the rateable portion of the money left in the agent's hands constitutes a sufficient consideration for his contract on the 21, Feb'y, 1873, on behalf of his company with the plaintiff. The pleadings concede the policy to be the contract of the company. That contract is set up as one directly with Schacker. The acts prior to Feb'y 21, 1873, as the inducement, and the making of the contract on that day by the endorsement then made by the agent. The only defence is that as to the contract of Dec. 1, 1871, it was void because Austin, with whom it was made had no title, and therefore the contract of Feb'y 21, 1873, based upon money paid Dec. 1, 1871, and retained, is void for the same reason. But I reply that it is so drawn up as by its own words to obviate the objection so taken to the one of Dec. 1, 1871.

I submit the court below found against the facts proved.

And on the facts as found against the law of the case.

W. T. BURGESS,

For Pff.

IN THE

UNITED STATES SUPREME COURT.

OCTOBER TERM, A. D. 1876.

HENRY W. SCHACKER,
Plaintiff in Error,

v.

THE HARTFORD FIRE INSURANCE COMPANY,
Defendant in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

GEORGE O. IDE,
OF PADDOCK & IDE,
DEFENDANT'S ATTORNEY.

CHICAGO:
BULLETIN PRINTING COMPANY, 112 MONROE STREET.
1876.

Supreme Court of the United States

OCTOBER TERM, A. D. 1876.

HENRY W. SCHACKER,
Plaintiff in Error,

v.

THE HARTFORD FIRE INSURANCE COMPANY,
Defendant in Error.

Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

STATEMENT.

MAY IT PLEASE THE COURT:

The issues of fact in this suit, in which the judgment, sought to be reversed here by the plaintiff in error, was rendered, were tried and determined by the Circuit court and settled in favor of the defendant in error, without the intervention of a jury—a jury having been waived by the written and filed stipulation of the parties.

The findings of the court upon the facts are special, and appear in the record. (Printed Record, p. 15–28.)

No exception was taken by plaintiff in error to any ruling of the Circuit court in the progress of the trial of the cause, and the bill of exceptions does not present any. There is none in this record, other than the general exception made to the special findings of the Circuit court upon the facts proved (Printed Record, p. 29, folio 78), nor is there any question on the pleadings raised by the plaintiff in error.

The question, therefore, for review can extend no further than a "determination of the sufficiency of the facts found to support the judgment."

The plaintiff in error declared in assumpsit upon a policy of fire insurance, issued by the Hartford Fire Insurance Company, to one O. P. AUSTIN, upon a dwelling-house situated on a certain tract of land in Cook county, Illinois.

The first count of the declaration, after setting out the various provisions and conditions of the policy—(and among them two to the effect, viz., that if the policy should be assigned without the consent of the Company endorsed thereon; or if the assured is not the sole, absolute and unconditional owner of the land on which said building stood, by a title in fee simple, and this fact is not expressed in the written portion of the policy, then and in every such case the policy should be void, and that no officer, agent or representative of the Company should be held to have waived any of the terms and conditions of said policy unless such waiver should be endorsed thereon in writing)—avers that Austin mortgaged the house and the land whereon the house stood and formed part of

plaintiff's freehold, to the plaintiff, Schacker; that the mortgage was foreclosed, under the power of sale contained in it, after the making of the insurance policy, and a deed of the house and land was executed in pursuance of the sale to one John Frahn, in whom all the estate of Austin in said premises vested thereby; that afterwards, Frahn, failed to pay the purchase money, and plaintiff claiming a vendor's lien on the premises, Frahn re-conveyed the premises to the plaintiff in payment of his bid; that Austin, on September 28th, 1872, assigned the policy of insurance to the plaintiff; that afterwards, about February 21st, 1873, plaintiff stated to Fowler, an agent of defendant, the facts and circumstances touching plaintiff's acquisition of Austin's title to the lands whereon the house stood, his lien thereon and in the policy, and that Fowler being so informed, and having knowledge of the premises and plaintiff's interest in them, and having full authority so to do, endorsed on the policy, and signed as the agent of the Company, the following: "Loss, if any, payable to H. W. Schacker, as his interest may appear. Evanston, February 21st, 1873."

The declaration then avers, that by this proceeding the policy and the right to recover for any loss that might happen by fire to the house, within the terms of the policy and subject to its conditions, not waived by said endorsement, vested in the plaintiff, and that he became thereby entitled to recover such loss the same as though the policy had been assigned to him with the assent of the Company, and that in consideration thereof the defendant promised the plaintiff to pay him any loss that might occur during the life of the policy.

The second count sets out the policy and its provisions in *hæc verba*, with an assignment of the policy by Austin, endorsed thereon on Sept. 28th, 1872, assigning the policy to Schacker, and avers the making of the mortgage by Austin to Schacker on September 18th, 1871, and that at that date and on Dec. 1st, 1871, Austin's interest in the land consisted only of a contract of sale to him from the Northwestern University, entitling him to a deed in fee when he should pay for the land; that after the first of December, 1871, and before February 21st, 1873, the premises were sold and conveyed to Frahn under the power in the mortgage, as stated in the first count; that afterwards Frahn, by a deed dated March 24th, 1873, re-conveyed the premises to Schacker, whereby the plaintiff became the assignee of Austin's interest in the house and land; that on Feb. 21st, 1873, the plaintiff informed the defendant's agent, Fowler, of his interest in the premises, and produced the mortgage and the deed to Frahn and the policy with Austin's assignment to him thereon, and that Fowler, as such agent, being advised of the contents of said mortgage and deed, and that plaintiff was not the sole, absolute and unconditional owner of the land in fee simple, executed and reissued to the plaintiff the said policy, with the writing, recited in the first count and signed by Fowler, written upon its face, whereby the defendant promised the plaintiff to pay him for loss or damage by fire sustained during the life of the policy.

Both counts allege the loss of the house by fire in April, 1873, and that the usual notice and proofs of loss were made as required by the policy.

From these allegations in the declaration it appears, that the plaintiff assumes as facts in the case the following:

1. That the policy issued to Austin contained a provision declaring the policy void, if any assignment of it was made without the consent of the Company; also a provision declaring the policy void, if Austin had any lesser interest than a fee simple in the land, on which the house insured stood, and this fact was not so expressed in the written portion of the policy; and also a third provision declaring the policy void, if any change in the title was made by sale, transfer or conveyance.

2. That Austin assigned his policy to Schacker on Sept. 28th, 1872, without any consent of the Company being endorsed thereon, and without any such consent being applied for; also that some five months afterwards, on Feb. 21st, 1873, Fowler, the agent of the Company, at the request of Schacker, wrote on the policy, "Loss, if any, payable to H. W. Schacker, as his interest may appear," and that this was all that was done on the part of the agent, he refusing at the time to endorse any consent of the Company to the assignment.

3. That the premises were mortgaged to Schacker by Austin, and, subsequent to the issuing of the policy, were sold under the power of sale, and conveyed to Frahn, who re-conveyed to Schacker, on March 24th, 1873; and thus a change was made in the title of the assured by alienation.

The plaintiff seeks to establish from the act of Fowler, the agent, in writing on the policy the words, "Loss, if any, payable to H. W. Schacker as his interest may appear," that such words amounted to a consent to the assignment

and that the policy was in effect thus properly assigned to him, and that the defendant thereby entered into a new contract with him and promised to pay him for all losses occuring during the life of the policy, without regard to forfeitures made or suffered by Austin, the insured.

To this declaration the defendant pleaded the general issue and several special pleas, which, by stipulation, were afterwards withdrawn, and all special defences were offered and received under the general issue. (Printed Record, p. 18; folio 47.)

These special defences were as follows:

1. That by one of the conditions of insurance, referred to in the policy and forming a part of it, it was provided that if the assured is not the sole, absolute and unconditional owner of the property insured; or (if the property be a building) of the land on which such building stands by title in fee simple, and this fact is not expressed in the written portion of the policy, then, and in such case, the said policy should be void; and that at the time of making said policy and the promises alleged in the declaration, Austin, the assured, was not the sole, absolute and unconditional owner of the land on which the building insured stood, by title in fee simple, but then owned only an equitable interest in said land, and that the fact of his real interest was not expressed in the written portion of the policy.

2. That by one of the conditions of insurance, referred to in the policy and forming part of it, it was provided that if the policy is assigned without the consent of the defendant endorsed upon it, the policy shall be void; and that after

the making of the policy, the assured, on September 28th, 1872, and prior to the alleged loss, assigned the policy without the consent of the defendant being endorsed thereon.

3d. That by another condition of the policy, it was provided that if any change should take place in the title or possion of the property insured, whether by sale, transfer or conveyance, legal process, or judicial decree, the policy should be void; and that the title of the assured in and to the insured property was, on February 21, 1873, sold, transferred and conveyed from the assured, by his authority, and by virtue of a certain mortgage with a power of sale therein written, made by the assured to the plaintiff on September 28, 1871, which mortgage was at the time of said sale in full force, whereby a change took place in the title of the assured on February 21, 1873, prior to the alleged loss, and said assured then and there became divested of such title.

The Circuit court, from the evidence adduced on the trial of the cause, found the following facts to have been proved (Printed Record, p. 15 folio 40):

"1st. That on the first day of December, 1871, the "defendant issued to O. P. AUSTIN, the policy of insurance, "whereby for a certain premium therein mentioned, the defend-"ant insured Austin for the term of five years in the "sum of fourteen hundred dollars on his dwelling-house, "situate in block two in the town of Evanston.

"2d. That said policy of insurance contained the fol-"lowing condition—'or if the insured is not the sole, abso-"lute, and unconditional owner of the property, or (if said

"property be a building or buildings) of the land on which "said building or buildings stand, by a title in fee simple, "and this fact is not expressed in the written portion of the "policy, * * * * then, and in every such case, said "policy shall be void.' Said policy also contained a clause, "declaring that it should not be assignable without the assent "of the defendant duly endorsed thereon in writing.

"3d. That, at the time of the issue of said policy, said "Austin was not seized of a fee simple title in the lot on "which said building was situated; but, on the contrary, the "fee of said lot was in the Northwestern University, and said "Austin held a contract from said Northwestern University, "whereby he was to receive a conveyance of said lot in fee "when he should make certain payments and perform cove-"nants in said contract set forth; and the special character "of said Austin's interest in said lot was not set forth in the "written part of said policy, nor noted upon said policy, and, "in fact, neither said defendant, nor its agent issuing said "policy, were aware of the special nature of Austin's title at "the time said policy was issued.

"4th. That on the ——— day of September, 1871, "said Austin, being indebted to the plaintiff, mortgaged his "interest in said lot and building to the plaintiff in due form, "and default having been made in the payment of the in-"debtedness secured by said mortgage, said plaintiff adver-"tised and sold said mortgaged premises at public auction, "under the power of sale contained in said mortgage, and "one John Frahn bid off said premises at said sale, at the "request of and for the use of said plaintiff; that after said

"sale plaintiff requested one Fowler, who was the local agent "of defendant at Evanston, to consent in writing on behalf of "said defendant to the assignment of said policy to plaintiff by "said Austin; that said agent refused to endorse such assent "upon said policy, but stated to plaintiff that all he could do "was to write into the body of the policy these words: 'Loss, "if any, payable to W. H. Schacker as his interest may appear,' "which words were accordingly written into said policy, and "said policy returned to the plaintiff by said agent; that said "agent, at the time he wrote said clause in said policy did not "know that said Austin's or plaintiff's title was less than a "fee simple; that after said mortgage sale and the insertion "of the words in said policy by said agent, said premises were "destroyed by fire, and said Schacker caused notice and proof "of loss to be furnished in due form and in apt time to said "defendant; and that defendant refused payment for the rea- "son of the failure to properly set out the title of the assured "to the property."

"5th. The court finds the issues for the defendant. Judg- "ment for defendant."

The plaintiff in error, by his counsel, at the foot of the printed record—whether there are any errors assigned in any brief we do not know, not having seen any brief filed for the plaintiff—assigns for errors in substance as follows:

1st. That the Circuit court found the issues for the defendant and rendered judgment thereon against the plaintiff.

2d. That the special findings of the facts proved, made by the court, are contrary to the evidence; also that the con-

clusions of law of the court upon the facts found by it are erroneous.

3d. That the second finding of fact, in a certain mentioned particular concerning the policy, is contrary to the evidence.

4th. That the fourth finding in a certain mentioned particular about the plaintiff's title, is contrary to the evidence of a certain witness.

5th. That the law upon the facts, as *proved*, is for the plaintiff.

6th. That the law upon the facts, as *found*, is for the plaintiff.

BRIEF.

I.

No question upon the pleadings in this case is made by the plaintiff in error. The declaration, counting on the policy is in assumpsit; the plea is the general issue, and by the stipulation of the parties and the leave of the court, the defendant was permitted under that plea to show any matter of defense. (Printed Rec., p. 18, folio 47.)

There was no objection made or exception taken by the plaintiff to any ruling of the Circuit court during the progress of the trial. The bill of exceptions mentions only a single exception, and that is simply a general exception to the special findings of the court of the facts, without specifying the point of the exception. (Printed Rec. p. 29, folio 98.)

There being, then, no exceptions to the rulings of the court in the progress of the trial, no objection of that character can now be heard. This court has ruled repeatedly that under section 700 of the revised statutes, where the finding of facts is special, it is authorized to examine no other question than "the determination of the sufficiency of the facts *found* to support the judgment."

Jennisons v. Leonard, 21 Wallace 307.

The second assignment of error, excepting the last clause thereof, and the third, fourth and fifth assignments, presented by plaintiff in error, are directed against the correctness of the special findings of the Circuit court, and invite this court to

look into the bill of exceptions and to weigh the evidence, in order to determine whether the Circuit court found the facts in accordance with the testimony. These assignments of error cannot be entertained. The findings are final and conclusive as to the facts. "When the court below makes a special finding this court will not go into an examination of the evidence on which it was founded, to ascertain whether or not it was right."

Copelin v. Insurance Company, 9 Wallace 462.

The rulings of this court on this point, that the findings of facts by the court are as conclusive as though they had been found by the verdict of a jury, that the bill of exceptions cannot be used to bring up the whole testimony for review, and that the only question that can be reviewed here is the law involved in the case, are so numerous and well settled, that it is hardly necessary to quote the authorities.

Insurance Company v. Sea, 21 Wallace 161.
Jennisons v. Leonard, 21 Wallace 307.
Insurance Co. v. Folsom, 18 Wallace 249.
Basset v. United States, 9 Wallace 38.
Norris v. Jackson, 9 Wallace 125.
Copelin v. Ins. Co., 9 Wallace 462.
Saulet v. Shepherd, 4 Wallace 507.

The errors numbered two, three, four and five, excepting the latter clause of the second, which charges error in the conclusions of law deduced by the Circuit court upon the facts found by it, may therefore be treated as immaterial and not to be considered.

There is then but a single question of law in the case,

viz., Are the facts found by the Circuit court sufficient to support the judgment?

II.

The insurance risk taken was upon the interest of O. P. Austin, in a dwelling-house. The contract was with Austin. The policy was taken out by him, in his own name.

This contract of insurance expressly provided that if Austin was not the sole, absolute and unconditional owner of the land on which the building stood, by a title in fee simple, and the fact of his having such lesser ownership was not expressed in the written portion of the policy, the policy should be void.

Here was a condition requiring the assured to disclose to the insurer the true state of his title, and if not truly disclosed, and so expressed on the face of the policy, both insurer and insured agreed when the policy was made, that it should not be binding.

Now, the evidence in the case is to the effect that the insured did not own the land on which the building insured stood, by a title in fee simple. On the contrary, the evidence, as found, shows that he had only an equitable interest in the land, by virtue of a contract of purchase with the Northwestern University; that the University was the owner in fee, and that Austin was not entitled to any deed of the premises until he had made certain payments to this University. It also appears that the fact that Austin owned a lesser interest than a fee simple was not expressed in the written portion of the policy.

The second finding of the court recites this condition of the policy, and the third finding is explicit as to the non-compliance with the condition, as follows:

"That, at the time of the issue of said policy, said Aus-
"tin *was not seized of a fee simple title* in the lot on which
"said building was situated; but, on the contrary, the fee of
"said lot was in the Northwestern University, and said Austin
"held a contract from said Northwestern University, whereby
"he was to receive a conveyance of said lot in fee when he
"should make certain payments and perform covenants in
"said contract set forth; *and the special character of said*
"*Austin's interest in said lot was not set forth in the written*
"*part of said policy*, nor noted upon said policy; and, in
"fact, neither said defendant, nor its agent issuing said pol-
"icy, as aware of the special nature of Austin's title at the
"time said policy was issued."

Such being the terms of the policy, and such the evidence of non-compliance by the insured with those terms, it follows that there can be no right of recovery on this policy under the facts found, there being no waiver of the condition shown.

It seems hardly necessary to cite precedents in support of so plain a proposition; but authorities are not wanting.

In *Reaper City Insurance Co. v. Brennan*, 58 Ill. R. p. 158, where, "at the time the insurance was effected, the property had been sold on a judgment and execution against the assured, but the twelve months allowed for redemption had not expired," it was held, "that the non-disclosure of this
"sale avoided the policy: the title of the assured was not en-

"tire, unconditional and sole, as required by the terms of "the policy."

To the same effect are the following cases:

Ill. Mut. F. Ins. Co. v. Marseilles Mfg. Co. 1 Gilman 265.

Smith v. Bowditch Ins. Co., 6 Cushing 448.

Wilbur v. Bowditch Ins. Co., 10 Cushing 446.

*Loehner v. Home M. F. Ins. Co.*17 Mo. 247.

Jenkins v. Quincy Ins. Co., 7 Gray 370.

Treadway v. Hamilton M. F. Ins. Co., 29 Conn. 68.

Day v. Charter Oak Ins. Co., 51 Me. 91.

"Where the insured was in possession only under an agreement to purchase, having paid but a part of the purchase money, the policy was held to be void, the insured not having an absolute estate."

Reynolds v. Ins. Co., 2 Grant (Pa.) 326–329.

There is no evidence that this condition was ever waived by any act or knowledge on the part of the defendant, the Insurance Company, or its agent who issued the policy.

The findings of the Circuit court are explicit on this point. In the third finding it was found, that "neither said defendant, nor its agent issuing said policy, were aware of the special nature of Austin's title at the time said policy was issued." And in the fourth finding it is also found, that at the time when the agent wrote in the policy, at the interview of the plaintiff with him, the words, "Loss, if any, payable to H. W. Schacker, as his interest may appear," "said agent did not know that said Austin's or plaintiff's title was less than a fee simple."

This is all the evidence bearing in any way upon the question of wavier, and it negatives any presumption even that the condition was dispensed with, by the conduct of the parties towards each other.

The plaintiff in error, however, in his declaration, assumes that the insertion in the policy of the words, "Loss, if any, payable to H. W. Schacher," etc., import the creation of a new contract between the plaintiff and the defendant: that they are equivalent to an endorsement on the policy of the consent of the Company to the assignment of the policy made by Austin, and that this new promise is not affected or invalidated by the non-compliance of the insured with the terms and conditions of the policy; in other words, that the writing of these words on the face of the policy effected a wavier of the stipulations, concerning the title in fee and the written consent of the Company to the assignment.

The mere writing of these words in the policy by the agent, under the circumstances disclosed in the findings, cannot have the effect so claimed for the plaintiff in error. Unless the legal meaning of these words is that which plaintiff's counsel presumes, no such effect or meaning can be drawn from the language. The evidence utterly fails to show that the agent had any knowledge or information of Austin's real interest in the land, and that it was less than a fee simple. The evidence shows that there was no conversation or understanding between the plaintiff and the agent with a view to waive any of the conditions of the policy. On the contrary, it is found by the court that the plaintiff applied to the agent "to consent in writing, on behalf of the defendant, to the

assignment of the policy, which Austin had made to the plaintiff," but the agent *refused* to endorse such assent on the policy, and stated that all he could do was to write into the body of the policy the words above quoted.

Here was an express refusal to consent to the previous assignment, and all that the agent was asked to do was to write on the policy a written consent to the assignment. Nothing transpired between the plaintiff and the agent beyond this. The question concerning Austin's title was not even alluded to. How, then, can it be claimed that the acts of the agent, in his interview with the plaintiff, worked a waiver of any of the conditions mentioned, when it is not shown that the agent had any knowledge or information concerning the true state of Austin's title in the land? How can it be claimed that the agent waived the provision about the assignment of the policy, when he expressly refused to endorse any consent to such assignment?

The only question remaining, then, is, what do the words "Loss payable," etc., written in the policy, mean, and what is their legal effect? Did they operate to waive the conditions in Austin's policy?

Courts have repeatedly given an interpretation to these words, which is adverse to the position of the plaintiff in error.

Thus in this court in *Bates v. Equitable Insurance Co.*, 10 Wallace 33, it was held:

"1. A policy of insurance contained the usual covenant that if the property was sold the insurance ceased, unless the consent of the insurer was given in writing to the sale: Held that an endorsement on the policy by the assured, 'Payable,

in case of loss, to E. C. Bates ' (the plaintiff), and under this the endorsement by the insurer that ' Consent is hereby given to the above endorsement,' did not imply either a knowledge or consent to the *sale* of the goods insured."

" 2. Such indorsements are entirely consistent with the property in the goods remaining in the assured, *and mean no more than that the loss of the* ASSURED *shall be paid to the third party.*"

" 3. If such third party had really purchased the goods before the loss, then the party *assured* sustained no loss, and the policy covered none, and no action could be sustained on it."

It is held in *Fogg v. Middlesex Ins. Co.*, 10 Cushing p. 348, that the clause " Loss payable," etc., is not an assignment of the contract, but only of a right to the recovery in case of loss.

In *Hale v. Mechanics M. F. Ins. Co.*, 6 Gray 172, the court say ; " The legal effect of this clause is that the defend- " ants agree that the plaintiff shall recover whatever the per- " sons originally insured by the policy may be entitled to re- " ceive in case of loss ; but it is only a contingent order or " assignment of what may become due under the contract, " and not an absolute transfer by virtue of which the plaintiff " acquired the full rights of an assignee of a chose in action. " The plaintiff stands and must claim in right of the assured " and not in his own. It is only what they have a right to " receive under the contract that is payable to him. If, there- " fore, by reason of an act of theirs before the loss happened, " the policy was rendered void, their right to recover is de-

"stroyed, and there being no loss under the policy for which "the defendants are liable, the plaintiff cannot recover."

See, also,

Young v. Eagle Fire Ins. Co., 14 Gray 153.
Loring v. Manufacturers Ins. Co., 8 Gray 28.

So in *Grosvenor v. Atlantic Ins. Co.*, 67 New York 391, it is held:

"When a fire policy names the owner of the property as the person insured, and declares the damages in case of loss to be payable to another person therein named as mortgagee, the latter cannot recover in case of a breach of the condition of the policy by the mortgagor. In such case the contract is with the mortgagor, and for the insurance of his interest, and the mortgagee can recover only when the mortgagor could have done so, had the money been payable to himself instead of being payable for his benefit to the mortgagee."

FLANDERS ON FIRE INSURANCE, p. 441, says:

"When the policy provides that 'the loss, if any, is payable to another,'—to a mortgagee, for example—instead of the assured, it is merely a designation of the person to whom it is to be paid, and is not an assignment of the policy. Hence it is the damage sustained by the party insured, and not by the party appointed to receive payment, that is recoverable from the insurers. The insurance being upon the interest of the insured, if he parts with that interest before the fire, no loss is sustained by him, and of course none is recoverable by his assignee or appointee. In other words, a policy made 'payable to A in case of loss' is an agreement on the part of the insurers that 'A' shall recover whatever

the person originally insured may be entitled to receive in case of loss; that is, it is a contingent order or assignment of what may become due under the contract, and not an absolute transfer by virtue of which the assignee acquires the full rights of an assignee of a chose in action."

The question has been similarly decided by the Supreme court of Illinois, in *Home Ins. Co. v. Hauslein*, 60th Illinois p. 522–523, the court saying:

"It has been fully settled by this court, that the assignee "of a policy takes it subject to the conditions expressed upon "its face; and his equities confer no rights, if the assignor "has lost all right of recovery by a violation of any of the "terms or conditions of the policy. (*Ill. M. Ins. Co. v. Fix*, 53 Ill. 151.)

"When the assignment was made, the assignee knew of the "condition in the policy providing for forfeiture in the event of "alienation, and his rights must be controlled thereby. His "position is identical with that of the assured, so far as the "terms of the contract must govern the rights of the parties.

"But it is contended that the memorandum, 'that the "loss, if any should be payable to the assignee, as his interest "might appear,' shows that his interest was intended to be "protected and that there was no sale or change of title affecting the interests of the assignee.

"The insured cannot sue, because he has so acted as to "forfeit the policy. The assignee cannot sue, for he was not a "party to the contract originally. In its nature the policy was "only assignable so as to pass an equitable interest to the assignee. Even, as in this case, where the assignment was

"made with the consent of the Company, the assignee cannot "sue for a breach in his own name. (*Jessel v. Williamsburg* "*Ins. Co.*, 3 Hill 88.)

"The assignment was made with the consent of the Com- "pany, but the condition of forfeiture upon alienation, without "the consent of the Company, was still applicable to the as- "signee as well as to the insured. The Company did not "waive the effect of the breach of the condition."

From these authorities it is apparent that Schacker, the plaintiff in error here, stands only in the shoes of Austin, the insured. The words written in the policy, "Loss, if any, payable to H. W. Schacker, as his interest may appear," mean in the language of the opinion in 10 Wallace 33, "no more than that the loss of the *assured* shall be paid to" Schacker. If, as the fourth finding shows, all of Austin's interest in the insured premises had been alienated from him by the foreclosure of the mortgage and the conveyance to Frahn, prior to the fire, it follows that Austin, the assured sustained no loss, and the policy covered none, and no action could be sustained upon it, by him; and if not by him, then there was no loss to be paid to Schacker.

So, likewise, if the policy became void as to Austin by the non-compliance of Austin with the condition concerning the title of Austin in the land on which the building stood, Schacker acquired no superior or further rights by the insertion of the clause of payment to him in case of loss. The insertion of these words created no new policy or contract. They simply designated him as the person to whom the damages were to be paid, in the event Austin sustained loss by

fire Hence, if Austin could not recover on the policy because it had been avoided by his omission to have his lesser interest described in writing in the policy, Schacker can claim no better right to recovery.

So, too, in regard to the assignment of the policy. The assignment without the consent of the Company endorsed on the policy, avoided the policy. When this consent was asked, long after, it was refused, and never was given. The clause "Loss payable," etc., only was inserted, with the statement by the agent that this was all he could do. The evident meaning of this was, that if Austin had no right of recovery for any loss under such circumstances, Schacker was to have none. If Austin had any such right remaining, then the amount of loss should be paid to Schacker. This seems to be the whole scope and object of the endorsement.

Now, it will be noticed, that the policy had been forfeited long prior to the writing in the policy of the words, "Loss payable," etc. First, by non-compliance with the condition concerning title in fee simple. Second, by Austin's assigning the policy without the consent of the Company endorsed on it. The communication to the agent of the fact of the assignment, after foreclosure, could not revive it, nor could it be a waiver, unless the agent endorsed this consent, or the writing of the clause quoted in the policy, is equivalent to such consent—which is an inference, however, hardly to be deduced, either from the circumstance of the agent's positive refusal to consent, or from the legal meaning of the language used.

But, however this may be with regard to the question of

assignment, it will not be pretended that there was any waiver by the defendant of the condition concerning the title. The policy was forfeited, as to Austin, by the failure to comply with this condition. No communication of Austin's real title was ever made to defendant; hence, there has been no waiver of the forfeiture under that condition. And even if there had been such communication made to Fowler, the mere fact of such communication, after the forfeiture, could not renew the policy, nor could it operate as a waiver when no action was taken upon it with a view to revive the policy. The writing of the loss-payable clause in the policy by the agent, produced no such effect of itself, nor was it so designed by him, for the evidence as found shows no knowledge or information, on his part, of Austin's title to the land being less than a fee simple.

Home M. F. Ins. Co. v. Hauslein, 60 Ill. 524.
Loring v. Manufacturers' Ins. Co., 8 Gray 29.

It matters but little in this case, upon which of the three defenses to the policy the case is decided. Each of these defenses is sufficient to defeat the plaintiff's action. The findings of the court clearly show that each was fully established on the trial below.

1. That the policy was forfeited by Austin's omission to state that he had only an equitable interest in the land on which the building stood, and to have this lesser interest so expressed in the written portion of the policy.

2. That the policy was forfeited, also, for the reason that the insured assigned the policy to the plaintiff without the written consent of the defendant to the assignment being

endorsed on the policy, either then or at any time afterwards, prior to the fire.

3. That the policy was forfeited, likewise, by the breach of the alienation clause contained in the policy, which declares, "if any change take place in the title or possession of the property, whether by sale, transfer or conveyance, legal process or judicial decree, the policy shall be void;" the fourth finding expressly showing that Austin's title was divested by virtue of the sale made under the power contained in the mortgage, and conveyed to Frahn, and was thus, by his own consent and appointment, alienated by him as effectually as if he had signed the deed himself.

Home Ins. Co. v. Hauslein, 60 Ill. 522.

Loring v. Manufacturers' Ins. Co., 8 Gray 29.

The case is respectfully submitted for the defendant in error.

GEORGE O. IDE,
OF PADDOCK & IDE,
Defendant's Attorneys.

BULLETIN PRINTING COMPANY, 112 Monroe Street.

April 3-24 Judge Davis

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Supreme Court of the United States.

OCTOBER TERM, 1875.

SELUCIUS GARFIELDE, Appellant,

vs.

THE UNITED STATES.

No. 937.

APPEAL FROM THE COURT OF CLAIMS.

Amendment to Argument of Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1875.

SELUCIUS GARFIELDE, APPELLANT,

vs.

THE UNITED STATES.

No. 937.

APPEAL FROM THE COURT OF CLAIMS.

AMENDMENT TO ARGUMENT OF APPELLANT.

STATEMENT OF THE CASE.

The Postmaster General, acting in conformity with section 243 of chapter 335 of the 17th Stat., 313 which provides "that before making any contract for carrying the mail, other than those hereinafter excepted, the Postmaster General shall give public notice by advertising once a week, for six weeks, in one or more, not exceeding five, newspapers published in the State or Territory where the service is to be performed, one of which shall be at the seat of government of such State or Territory, and such notice shall describe the route, the time at which the mail is to be made up, the time at which it is to be delivered, and the frequency of the service," * * * published an advertisement October 1, 1873, inviting proposals for carrying the mails from July 1, 1874, to June 30, 1878, over route numbered 43,132, (among others,) from Portland, Oregon, by way of Port Townsend, Washington Ter-

ritory, and San Juan to Sitka, Alaska, as follows: Record, p. 8.

"Proposals will be received at the *contract office* of this Department until 3 p. m. of February 2, 1874, (to be decided on or before March 2, 1874,) for conveying the mails of the United States, in the Territory of Washington, from July 1, 1874, to June 30, 1878, on the routes and by the schedules of departures and arrivals herein specified. * *

"43,132. From Portland, Oregon, by Port Townsend, (W. T.,) and San Juan to Sitka, Alaska, 1400 miles, and back, once a month, in safe and suitable steamboats.

"Leave Portland on 1st of every month; arrive at Sitka by the 10th of every month.

"Leave Sitka on the 13th of every month; arrive at Portland by the 23d of every month.

"Proposals invited to begin at Port Townsend, (W. T.,) five hundred miles less.

"Present pay, $34,800 *per annum*."

George K. Otis made a bid for service from Portland to Sitka. He made no proposal to begin at Port Townsend. (Record, 5.) Selucius Garfielde, the claimant, made this proposal:

"The undersigned, Selucius Garfielde, whose post-office address is Port Townsend, county of Jefferson, Territory of Washington, proposes to convey the mails of the United States from July 1, 1874, to June 30, 1878, on route No. 43,132, between *Port Townsend* and Sitka, Alaska, *under the advertisement of the Postmaster General, dated October* 1, 1873, *in safe and suitable steamboats, with 'celerity, certainty, and security,' (law of June* 8, 1872,) *for the annual sum of twenty-six thousand dollars.*"

"This proposal is made with full knowledge of the distance of the route, the weight of the mail to be carried, *and all other particulars relative to the route and service;* and also *after a careful examination of the laws and instructions attached to advertisement of mail service.*" (Record, 5.)

This proposal was signed by claimant, and dated at Port Townsend, January 8, 1874.

Mr. Otis objected to Mr. Garfielde's bid; first, because it did not meet the requirements of the 267th Regulation of the Department, (Record, pages 5 and 7;) and, second, because Mr. Garfielde was a federal officer, a collector of customs at Port Townsend. This protest was, on the 21st February, 1874, referred by the Postmaster General to Assistant Attorney General Spence, of the Post Office Department, for careful examination, and for his opinion in writing. On the 17th of March, 1874, Assistant Attorney General Spence gave his written opinion that neither of the positions taken by Mr. Otis could be sustained. And said opinion was approved by the Attorney General, April 3, 1874. (Record, page 6.) Immediately thereafter the Postmaster General notified Mr. Garfield that his bid was accepted.

On the 22d of April, 1874, the Attorney General reversed his former opinion, (Record, p. 6,) and on the 28th of April, 1874, the Postmaster General telegraphed Mr. Garfielde that his acceptance was suspended for the reason that the Attorney General had sent for the papers to revise his opinion. (Record, p. 6.)

The Postmaster General acting upon the second opinion of the Attorney General, failed to carry out the contract with Mr. Garfielde, and on the 28th of May accepted the bid of Mr. Otis, and entered into contract with him. (Record, p. 7.)

The form of advertisement used had been in use for many years, 907 cases of similar advertisement having been proved. (Record 7, folio 12.)

The court found the claimant's profits above all expense, care, trouble, and risk would have been $15,000 per annum, and that there was a complete and binding contract if the Postmaster General had power to make it, but de-

cided that he had no such power, and dismissed his petition.

Assignment of Errors.

The court below erred:

1st. In deciding that the Postmaster General had no power to make the contract with Mr. Garfielde, under this advertisement. (Record, 9).

2. It erred in deciding that the 267th Regulation of the Department applied to this case. Record 10, folio 15.

3. It erred in deciding that the schedule of arrivals and departures set out in this advertisement, did not apply to the invitation for proposals from Port Townsend to Sitka. Record, 10.

4. It erred in deciding that the appellant could not legally bid for the service from Port Townsend to Sitka, without first bidding for the service from Portland to Sitka. Record, 10, 11.

5. It erred in deciding that the advertisement was contrary to law, and, therefore void.

6. It erred in dismissing claimant's petition.

E. C. INGERSOLL,
B. F. RICE,
Attorneys for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1875.

SELUCIUS GARFIELDE, Appellant,

vs.

THE UNITED STATES.

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APPEAL FROM THE COURT OF CLAIMS.

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APPEAL FROM THE COURT OF CLAIMS.

Reply of Appellant.

Counsel for appellant, in preparing their argument in this case, were of opinion that the rules regulating appeals from the Court of Claims modified the 21st rule of this court, in so far as to render a synopsis of the pleadings, and a full detail of the facts found, and errors claimed to have been committed by the court below, unnecessary; these appearing at large in the record.

They did, however, set out the main points stated in the petition, and the main facts found by the court, upon which the case must ultimately turn, in five consecutively numbered paragraphs, (Argument, p. 1.) They also stated the two errors upon which the judgment of the court below seems to rest, (Argument, p. 2.) This was believed to be a substantial compliance with the spirit of rule 21, and is the answer to the Assistant Attorney General's first criticism. The statutory references are to the revised code, the sections

cited being, *verbatim*, the same as in the consolidation act of June 8, 1872.

At the bottom of page 3, of the Assistant Attorney General's argument, this language occurs: "It will be noticed that Mr. Garfielde made no proposal to start at Portland, or to deliver a mail there, and made no statement of the frequency of service, nor the times of starting and delivery at the termini he suggested."

This statement is neither candid nor ingenuous, and must have been made by mistake, or with intent to mislead. Mr. Garfielde "*suggested*" no termini, but followed the plain invitation contained in the advertised or published notice. If the words "under the advertisement of the Postmaster General, dated October 1, 1873," contained in his proposal, (Record, p. 5,) have any meaning, they make his proposal subject to all the conditions annexed to route No. 43,132, including termini, frequency of service, times of departure and arrival, mode of conveyance, and intermediate delivery.

At the bottom of page 22 of his argument, the Assistant Attorney General complains bitterly of our treatment of a former head of his department, because his second opinion is referred to as an "after-thought," &c. This, however, is a mild allusion to the facts in the case, when compared with his explanation of them. He says, (Argument, p. 4,) "the Assistant Attorney General for the Post Office Department overruled these objections, (made by Otis,) and this opinion was *hastily* approved by Attorney General Williams, April 3, 1874, but, on reflection, he reversed that opinion, April 22, 1874, upon the ground that Mr. Garfielde's proposal was not, after due advertisement, made so as to authorize a contract with him. Attorney General Williams states that his attention was not called to this point, but only to the other, when he signed an approval, endorsed upon the opinion of his assistant, for the Post Office Department." And yet Attorney

General Willams had endorsed upon the opinion of Assistant Attorney General Spencer the words, "In so far as the foregoing opinion holds that the bid of Mr. Garfielde is not invalid on account of the *advertisement* * * I approve it." The Assistant Attorney General having charge of this case may be able to harmonize these statements. He has certainly undertaken quite as difficult a task in endeavoring to find law to sustain Attorney General Williams' last opinion.

The statement of two facts will clear off much of the haze which appears to have surrounded the Assistant Attorney General while preparing his argument. First. Post roads or routes are established either by legislative enactment or by the action of the Postmaster General. All land routes are included in the former, and all water routes in the latter. Revised Statutes, Sec. 3964.

Second. There is no law requiring the Postmaster General to place mail service upon the whole or any part of any post road, although established by law, except when, in his judgment, the same may be necessary. The whole matter is left to the exercise of sound executive discretion. It follows, then, that he may place mail service upon any post road, or or any part thereof, as may appear to him best for the public welfare; and to this end may enter into contract for such service, provided he shall open the same to free competition, by publishing a notice of what is wanted, with sufficient particularity to notify and fully advise bidders, and enable them to make their proposals understandingly.

A water post road is the creation of the Postmaster General, and takes any direction and length, and is limited by any termini which he may designate. It continues at his pleasure and ceases to exist at his will. Viewed in this light, the italicized line in the Assistant Attorney General's argument (p. 7), "He (Garfielde) made no proposal to carry the mail over the then existing route

43,132," loses all its force. No such route was ever established by act of Congress. It became a post road by the act of the Postmaster General in placing service upon it, and whether the service shall begin at Portland or Port Townsend, the route is still No. 43,132, by the direct act of the power which makes it a post road. The different termini are placed under the same number and constitute but different starting points for the same route.

The Assistant Attorney General having failed to shake the foundations upon which the dissenting opinion of Judge Nott, of the Court of Claims, is based, it is deemed unnecessary to review that portion of his argument.

The Assistant Attorney General, in his argument (p. 14) makes what is, perhaps, a fair criticism upon our use of the word "advertisement," but in so doing exhibits a confusion of ideas wholly inexcusable. We used the term "advertisement" in the sense of notice, and are still of opinion that the *substance* of the notice constituted a part of the contract, while the *publication* of that notice is the statutory prerequisite. If A advertises for proposals for the erection of a dwelling-house upon his premises, specifying all the details in the notice, and B tenders proposals for the work, "under the advertisement," giving the date of its publication; and A accepts such proposal, the notice or advertisement becomes a material part of the contract itself, without which the proposal and acceptance would be meaningless; and the notice, proposal and acceptance constitute a contract.

In the case of postal service advertisements, the notice must contain the statutory elements; but this makes it none the less a part, and a very important part, of the contract, and subject to the rules of interpretation stated in our opening argument. When to this is added the fact, that the Postmaster General, under his authority "to decide on the forms of all official papers," not only prescribes the form of the notice for publication, but also

decides upon the form of the proposal, furnishing bidders forms prepared by himself for that purpose, and appellant made his proposal upon one of those forms in full compliance with instructions, the Assistant Attorney General's objection that appellant's bid did not state the times of arrival and departure, the frequency of the service, and the intermediate points of delivery, falls to the ground. (Argument, p. 17.) The published notice states these elements, and the prescribed form of proposal used by appellant declares that it is made "under the advertisement of the Postmaster General, dated October 1, 1873," thus making the terms and conditions of the published notice a part of the proposal.

The argument of the Assistant Attorney General, on page 18, seems too feeble to require answer. When the facts are stated in their proper light the court will be able to judge of the reasoning. It is there stated, "but the record shows that route 43,132 is an excerpt from a whole string of advertised routes in the Pacific States and Territories, and that whole columns of matter, scores of statements of the times of arrivals and departures intervened between the words he quotes and the time inviting such proposals, as he claims to have made." These statements are all true; and what of it? By reference to the bottom of page 4 *et seq.*, of the record, it will be seen that the Postmaster General makes a general announcement, equally applicable to all the routes which follow in the advertisement, declaring that proposals will be received for carrying the mails "on the routes and by the schedules of departures and arrivals herein specified." Then follow the different routes, each one arrayed under a separate number. Now it requires the legal and critical acumen of an Assistant Attorney General to discern what difference it makes whether route 43,132 be the first or the five-hundredth route in that list. If the general announcement mean anything, it means that the mails upon each

route are to be carried "by the schedule of departures and arrivals," specified in the published notice of that route; and by implication, equally strong, the published schedule, if there be but one to a given route, is to apply to all forms in which that route may be advertised.

It is unnecessary to repeat what was said in our opening argument upon the 267th regulation of the Department, and the meaning of the word "service." That remains unanswered and, as we believe, unanswerable. The words "indiscriminate, absurd jumble," constitute but a poor reply to an honest treatment of an important question. We only repeat our former statement in saying that, under the construction given to the 267th regulation by the Court of Claims, and followed by the Assistant Attorney General, there can be no competition for the shorter service advertised, and no limit fixed to Departmental discretion. The object of the law is defeated, and the door opened for fraud and imposture. As complaint has been made of our failure to cite specific sections in determining the meaning of the word "service," the following are given in reply:

Revised Statutes, Sections 3941–43–46–53–54–60–62.

Postal Regulations, Sections 259–63–69–74

The argument of the Assistant Attorney General is addressed to the eye rather than to the mind, and underscored words and sentences are used with a freedom very exhausting to the italic cases of the printer. In this way the impression is sought to be made that the appellant was *not* a regular bidder for the *advertised* service. Under our view of the law, this is untrue. The service from Port Townsend to Sitka is an advertised service as well as that from Portland to Sitka. Portland and Port Townsend are but different termini for the same route, and all the conditions of the published notice apply equally to both.

The reasoning of the opposing argument on page 20 seems to be without relevancy. In the exercise of the dis-

cretion given him, and in view of all the surrounding circumstances, the Postmaster General awarded the contract to the appellant, the lowest and only bidder for service from Port Townsend, and thereby terminating his power to act in the premises. This remains true whether the bid of Otis, when cut down to the service from port Townsend, would be lower than that of appellant, or not. The point made, and which remains unanswered is, that under the construction given to the 267th regulation by the Court, of Claims and adopted in the opposing argument, service upon the shorter route is not open to competition, and that, in this case, if the Postmaster General had desired the Port Townsend service he would have been compelled to give it to Otis, whatever might have been the *pro rata* rate or to readvertise. Our position involves no such absurdity. The Postmaster General might have awarded the contract for service from Portland to Otis at $34,800, or $50,000 had the latter been his proposal, and afterwards shortened the route to Port Townsend, allowing *pro rata* for the service continued. But he did not do this. In his judgment, the service beginning at Port Townsend would answer all public necessities, and save money to the Treasury. He therefore awarded the contract to appellant.

The Assistant Attorney General is equally unfortunate in his argument on page 21. The italicised lines have no bearing upon this case. Appellant *was* the "lowest responsible bidder for advertised service." The usage in advertising is proven by the 907 cases cited, and the usage in contracting, if it be worth anything, is inferable from the action of the Postmaster General in the case at bar. It is hardly presumable that he awarded a contract in direct and flagrant violation of a regulation (the 267th) made by himself. The position of appellant upon this question is still further illustrated and confirmed by the

letter of the Postmaster General which is made the foundation for a motion in this case. In it he says:

"The opinion of the late Attorney General, Hon. Geo. H. Williams, of 22d April, 1874, (14 Opinions, p. 389) unsettled the practice which had obtained in the Department for a number of years as to advertisements. * * * That opinion decided that an advertisement in the manner and form that had been used and practiced in the Department was not in accordance with law, and was no advertisement."

The remarks of the Assistant Attorney General, commencing at the bottom of page 22 of his argument, are wholly uncalled for. Not a single word of appellant's argument was intended as a censure of the action of the Court of Claims, or a criticism upon the motives affecting their judgment in the case; nor is it believed that the words used bear such a construction in their ordinary sense. The rights of a private citizen, however humble, are entitled to consideration and his words to fair construction, even by one "acting under the sanction of an official oath and the weight of official responsibilities." And when words are put into appellant's mouth, and he is presumed to say that "the supreme judges were party to the conspiracy to defraud him of his rights," the bounds of both propriety and good manners have been exceeded; and we are disposed to say in his own words, "we doubt if it would have been thought prudent to venture upon these expressions in an oral argument."

The closing paragraph of the Assistant Attorney General's argument relates to the measure of damages, and avers that the Court of Claims erred upon this point. It is difficult to understand how a stipulation of the terms upon which the service under a contract may be discontinued, impairs the rights of either party in case of actual breach. The fact that the defendant has reserved the right to discontinue service upon one month's pay extra,

only fixes more definitely his liability in all respects not so provided for. Without statutory provision or express stipulation, a discontinuance of service on a route after contract, would constitute a breach entitling the other party to full damages. Such also is the case with any breach, the damages for which have not been liquidated in the contract. The exception which the United States have expressly made, in case of discontinuance, establishes the rule.

The following propositions, with the authorities in support thereof, complete appellant's case:

1.

In this case, the suspension of the acceptance and the making of a contract with Otis for the same service prior to the 1st day of June, 1874, constitute the breach; and thereafter no act on the part of the petitioner was necessary, the United States having put compliance out of its power. Crabtree *vs.* Messersmith, 19 Iowa, 182, and cases cited. Dupyster *vs.* Pulver, 3 Barb., 284. Newcomb *vs.* Brackett, 16 Mass., 161; 8 Md., 201; 2 Pet., 102; 26 Wis., 514; 12 Ind., 274. Chitty on Contracts, 738.

II.

The measure of damages is the difference between the contract price and the cost of performance. Speed's Case, 7 Ct. Cls., 97. Clark *vs.* The Mayor, 4 N. Y., 338. Adams' Case, 1 Ct. Cls., 106, 342. Cunningham *vs.* Dorsey, 6 Cal., 19. 7 Cush. Mass., 522; 13 How., 344.

III.

In executory contracts, terminated by the Government, without the fault of the other party, it should place him in as good condition as he would have been by performance. Wormer's Case, 4 Ct. Cls., 259. Woodruff & Bouchard's Case, 7 Ct. Cls., 605, 472.

IV.

An executory contract, terminated by the Government, without the fault of the other party entitles him to sue for the entire damages, both past and prospective, accruing by reason of the breach. Stille *vs.* Jenkins, 3 Green., N. J., 304. Adams' Case, 1 Ct. Cls., 106; 31 Vt., 585.

V.

In the construction of statutes, the long continued and uniform usage of a department of the Goverment will not be departed from by the courts, unless it appear to be in plain and palpable violation of the letter and spirit of the law. U. S. *vs.* Ship Recorder, 1 Blatch., 66, 218. Edwards *vs.* Darby, 12 Wheat., 210. U. S. *vs.* Lytle, 5 McLean, 9. U. S. *vs.* Gilmore, 8 Wallace, 330. 8 Op. Att'y Gen., 24; 1 Pet., 230. U. S. *vs.* State Bank of N. C., 6 Pet., 39, 218. U. S. *vs.* McDaniel, 7 Pet., 2.

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